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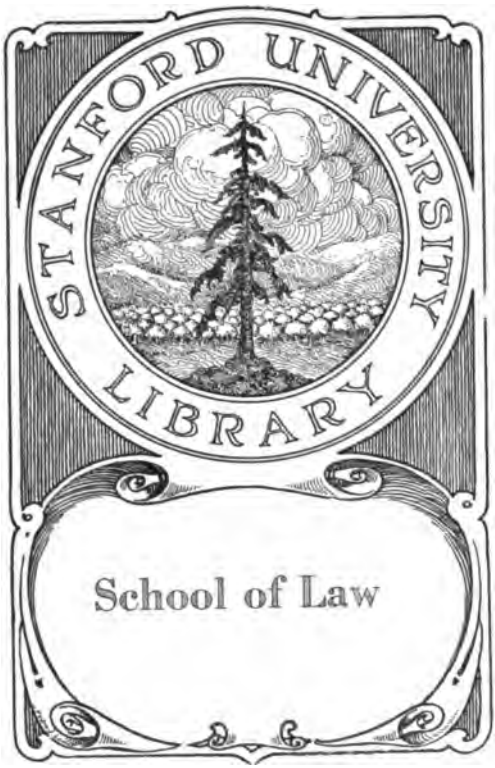

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DIARY FOR JANUARY.

1. Wed. ..New Year's Day.
2. Thur ..Christmas Vacation in Court of Appeal ends.
5. Sun. ..2nd Sunday after Christmas.
6. Mon....Christmas Vacation in Chancery ends. Mun. Elec. held. Heir and Dev. Sitt. begin. Co. Ct. Terms begin. Hamilton assizes.
7. Tues ..Toronto Assizes.
8. Wed...Christmas Vacation in Exchequer Ct. ends.
10. Fri....Christmas Vacation in Supreme Court ends.
11. Sat....County Court Term ends.
12. Sun....1st Sunday after Epiphany. Sir Chas. Bagot, Gov.-gen., 1842.
14. Tues...Court of Appeal sits.
19. Sun. ..2nd Sunday after Epiphany.
20. Mon ..Supreme Court sits. First meeting of Mun. Councils (ex. Co. Council.)
21. Tues..Heir and Dev. sitt. end. County Councils hold first meeting. Primary Examination.
22. Wed..Primary Examination.
23. Thur..Primary Examination.
25. Sat ..Sir F. Bond Head, Lt.-Gov. U. C., 1836.
26. Sun....3rd Sunday after Epiphany.
28. Tues...1st Intermediate Examination.
29. Wed ..2nd Intermediate Examination.
30. Tues ..Examination for Attorneys.
31. Frid..Earl of Elgin, Gov.-Gen., 1847. Examination for Call.

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LAW SOCIETY OF UPPER CANADA .....

Canada Law Journal.

Toronto, January, 1879.

The last *Canada Gazette* announces that Herbert Stone McDonald, Esquire, Junior Judge of the County Court of Leeds and Grenville, has been appointed Judge of that Court, *vice* R. F. Steele, Esquire, who died in the month of January, 1875.

It was at one time thought improbable that the Supreme Court would sit on the 20th of January, as in due course it should, as Sir W. B. Richards is still absent on sick leave, and the last appointed Judge cannot be sworn in, as the law stands at present, until the Chief's return. It is said now, however, that arrangements have been made which will prevent the necessity of any adjournment.

A fourth edition of Harrison's Municipal Manual has just been published, edited by Mr. Frank Joseph, Barrister-at-Law. The editor tells us that the annotations to the third edition have been retained with but trivial alterations, and that the new matter was compiled almost entirely from notes prepared by the late Chief Justice. We are satisfied that Mr. Joseph has done his part of the work well, as he has already proved himself an intelligent, careful, and painstaking compiler and editor in other works. There is a melancholy interest attaching to this edition of Mr. Harrison's popular law book, in that even during the last days of his illness he made suggestions relating to its concluding pages. The present volume is much larger and more complete than any previous edition.

Now that stenography has become an "institution" of the Courts, it will be well to have this system of taking the evidence as nearly perfect as possible. One great defect at present is, that one reporter is not able to read the notes of another, and this, we understand, is chiefly owing to arbitrary symbols being used which are peculiar to the individual reporter. One can see at a glance the immense disadvantages of this, in case of death or illness of a reporter. All the reporters in the Courts should have a common system of writing, so that each could write out at large the evidence taken by another. So also in the event of a dispute as what language was used by the witness, the stenographer should be able to check the notes of the other, and so corroborate or correct his report.

In *McDonald* v. *Notman*, 25 Gr. 608, the Court of Chancery held that no implied promise to pay a debt extinguished by a discharge in insolvency will revive such a debt; but that for such a purpose an express undertaking to pay the amount must be established. The late cases in England do not appear to have been cited, which would, perhaps, have led the Court to state their conclusions more broadly. In *Heather* v. *Webb*, 46 L. R. C. P. 89, it is laid down that a promise by a debtor to pay a debt barred by a discharge is *nudum pactum*, and its breach affords no cause of action. Lord Coleridge observed that the aim of the Act being to give the bankrupt a new start, to allow such promises to be good would be, by a side-wind, to reverse the whole policy of the Act. See also *Jones* v. *Phelps*, 20 W. R., 92, therein cited.

Lord Justice Christian, of the Irish Bench, has retired from that position. He is spoken of in the *Irish Law Times* in the following terms:—"The recorded judgments delivered by Mr. Justice Christian will ever command the highest respect of the profession—a respect likely to increase yet more in future years. They were ever distinguished by exhaustive research, profound erudition and perspicuous instruction; they were pronounced with logical precision, incisiveness and force; they were guided by inflexible impartiality and independence." Whatever may have been the eccentricities and faults of this eminent Judge, there can be no question of his learning ability and uprightness. His hearing had become seriously impaired of late years, and it was mainly owing to this that he resigned. He is said not to have had the sweetest temper possible; but it is generally admitted that his failing in this respect was only conspicuous when attacking what he believed to be abuses.

The following appointments have been made in Ireland, consequent upon the death of Judge Keogh, and the resignation of Lord Justice Christian:—

Gerald Fitzgibbon, Esq., Q.C., Her Majesty's Solicitor-General for Ireland, to be Lord Justice of Her Majesty's Court of Appeal, Ireland, in the room of the Right Hon. Jonathan Christian.

The Hon. Michael Harrison, Judge of the Court of Bankruptcy, Ireland, to be a Judge of the Common Pleas Division of the High Court of Justice in Ireland, in the room of the late Hon. W. Keogh.

Mr. Hugh Holmes, Q. C., to be Her Majesty's Solicitor-General for Ireland, in the room of Mr. Fitzgibbon.

Mr. Serjeant Robinson, Q. C., to be Judge of the Bankruptcy Court, Ireland in the room of the Hon. M. Harrison.

Several of the leading Dublin papers

say that Mr. Sergeant Robinson should have had the seat vacated by Mr. Justice Keogh; and they insinuate what we should be much inclined to doubt, that Mr. Harrison's appointment was solely owing to his being allied by family ties to Lord Cairns. The appointment of Mr. Fitzgibbon is considered a very good one.

In the "Notes of Cases" in this issue will be found the decision in the Niagara Election Case, on the preliminary objection filed by the respondent denying the jurisdiction of the Court. A Rule of Court was passed by the Courts of Queen's Bench and Common Pleas shortly after this judgment was given, the Judges, doubtless, thinking that such a Rule would fortify the position taken by the majority of the Court of Common Pleas and subsequently followed by the Queen's Bench and accepted, so far as the point has come before them by the other Court of the Dominion. The question may eventually come up for further discussion, though the Judges have so far expressed their belief that there can be no appeal from the decision on the preliminary objection. The Rule of Court is as follows:—

"It is ordered by the Judges of the Courts of Queen's Bench and Common Pleas—by virtue of the statutory powers which they possess and exercise, and by virtue of the other powers and authority which the said Courts jointly or severally possess and exercise, to make rules and orders for the effectual execution of the Dominion Controverted Elections Act of 1874, and of any other Act of the Dominion Parliament, connected with or relating to controverted elections, or to corrupt or other illegal practices at such elections or at any prior election, or to enquiries which may be made into or in any way concerning the same—that the procedure in the said Acts, and in each of them respectively enacted and provided in the cases above mentioned, and in each and every of them, shall be the course of procedure in such cases in these Courts in all respects as if the said procedure had been and was, as it now is, specially provided for, prescribed, and regulated by the said Courts, and by each of them, in the like manner and to the like tenor and effect as the said procedure in such cases is prescribed and enacted by the said respective Acts.—Mich. Term, Dec. 14, 1878."

We had occasion some time ago to call attention to a notice similar to the following, which has been used by a firm of country shopkeepers in the Town of Barrie for the purpose of collecting accounts. The document is as follows:—

"FINAL NOTICE,
BEFORE PROCEEDING IN THE

DIVISION COURT.

P. Marrin & Co. *vs.* James Crawford.

Take Notice, that unless the sum of $11.60 and cents, due from you to Plaintiffs, be paid within 10 days from the date hereof, you shall be proceeded against under the above Act; which enacts that, after ten free days, execution pass hereon for the said amount, by arresting and poinding, but with certification, that if the Defender agrees to pay by instalments, and he or she allow two instalments to run into the third unpaid, then, and in case, the indulgence of paying by instalments shall cease; and ordains execution to pass by the diligence aforesaid, for the whole sum decerned for and unpaid, in terms of the said Act of Parliament.

Dated at Barrie, this 8 day of November, in the year of our Lord, one Thousand Eight Hundred and Seventy 8.

Expenses.		
Original debt	11	60
Interest	2	00
Cost of this application ...	1	00
Postage	0	00
Total	14	63

P.S —If you prefer settling with P. Marrin & Co., before going into Court, bring this notice with you and save all further costs."

The document is, in form and appearance, like a Division Court summons, and is in print, except as to names, date and figures.

The impudent concoctor of this precious circular is not aware, probably, of the danger he runs of a conviction for felony under sec. 181 of C. S. U. C. cap. 19. If this is not "professing to act under a false colour of process of the Court," it is sufficiently near it to make the contemplation of the consequences anything but pleasant for the enterprising firm of P. Marrin & Co.

It is scandalous that this sort of thing should go unpunished. The County Attorney should look into the matter, and, if the offence is within the Statute, the parties should be made examples of. A reference to the law on this subject will be found in O'Brien's Division Court Manual, p. 91.

PROFESSIONAL AND OTHERWISE.

We had last month a full average crop of correspondence in relation to professional etiquette. One subscriber, in referring to our observations on the "card" of a Barrister at Leamington, says we "decidedly sat upon" that unfortunate person; but whilst admitting that the production was objectionable, claims that the Barrister is entitled to a large measure of sympathy. He puts his point forcibly in the following words: "All these country places are infested with a class of vermin called by politeness 'Conveyancers,' a class controlling the great bulk of the conveyancing (pretty much the only legal business in the country) in their various neighbourhoods. This Barrister referred to, no doubt, finding he could not live without practising this branch of his profession, very improperly threw aside professional dignity and degraded himself to the level of these quacks, whereas he should have wrapped himself in his gown and starved like a gentleman."

The writer says the statute requiring notaries to pass an examination is a step in the right direction, but it is, in effect, a dead letter. He also suggests that all laymen desiring to practise as conveyancers should be compelled to pass an examination in real property law, and pay a fee, or be made liable to the same extent as professional men.

The lawyers in the House of Assembly could probably obtain justice for themselves and their brethren in the matter of unlicensed conveyancers, if they chose, but we presume their seats, as a rule, depend more upon popular favour than upon any necessity that the country is in to retain their services. Why should there not be the same united action by the profession as there has been on the part of the less numerous but more hungry classes, such as registrars, sheriffs, official assignees, &c. Hunger seems to combine in formidable hunting packs others besides wolves.

Another correspondent sends us a printed circular of a newly fledged Barrister, not a hundred miles from Bowmanville, who addresses the litigating public in his neighbourhood, as follows:

"I beg to inform you I have opened an office at ———, for the practice of the law in all its branches, and would, therefore, solicit your patronage, feeling confident, from my experience with A. B. C. & D. (who will doubtless be charmed to hear of the enterprise of their former student), and by devoting, &c., to any business, &c., see fit, &c., will be able, &c., satisfaction, &c." This gentleman is, like every attorney, country storekeeper, conveyancer, or J.P., the agent of a wealthy and reliable loan company; (and, by the way, we may here observe that the facility of insuring one's

property is now only exceeded by the facility there is for disposing of it at a good price to some "wealthy and reliable loan company.") We agree with the American humourist that things are very "mixed." It may be all right, but the distinction between modern professional advertisements and those of small tradesmen is very slim. There is a strong family likeness between the circular before us and those which are promulgated on the "opening of our spring goods," or when "large reductions are made for cash," and such like.

DOWER AS AFFECTED BY THE STATUTE OF LIMITATIONS.

A farmer dies leaving a widow and three or four small children; makes no will, but has little to bestow, save his farm and its belongings. The widow stays on the homestead, works the place and brings up the children, till they come to years of discretion and can do for themselves. Twenty-five years elapse from the husband's death, and the children then of age claim the farm, as theirs absolutely. The widow has thought nothing of her legal rights, or of asserting her claim for dower, and she is told that, under such circumstances, her rights are extinguished. Can it be possible that such is the law in a civilized country? There are decisions plainly pointing in this direction; but if cruel injustice be thus legalized, is there not here scope for the Attorney-General's amending hand to some better purpose, than a re-distribution of Administration suits, or a development of Division Courts?

In *Laidlaw* v. *Jackes*, 25 Gr. 301, the cases are collected and their effect considered by Vice-Chancellor Proudfoot, and his conclusion is that the decisions at law indubitably establish that a widow must bring her action for dower under the statute then in force limiting actions within twenty years from the death of the husband. Of course, the time is known to be now still further limited to ten years from the husband's death, by Rev. Stat. c. 108, sec. 25. This, however, does not affect the discussion of the principles of law involved in the holding that the widow is barred of her claim for dower after the statutory period, even though she remain in possession with her infant children. This position was first laid down in *McDonald* v. *McIntosh*, 8 U. C. R., 388, which the Vice-Chancellor refers to as a case remarkable from the fact that the widow had been long in possession, though it seemed absurd that she should be held to have forborne the remedy when she had no occasion to resort to any, not being kept out of the estate, and when her bringing the action would only have had the effect of circumscribing what she was actually enjoying. The reason of the decision is put upon this, that the bar of the statute applies against the widow, even when in possession of the land in the absence of an actual assignment of dower. Such a psssession is not in respect of the estate of dower, because no such estate by the Common Law vests in her until actual assignment. This is the explanation which satisfied the mind of a judge, eminently well-skilled in real property law; the late Vice-Chancellor Esten: (*Leach* v. *Shaw*, 8 Gr. 498.)

The position of the widow, in this regard, is much more disadvantageous than that of the widower, as to his tenancy by the curtesy. To complete this estate of the surviving husband, no entry or formality is necessary. Upon the death of the wife, the law adjudges the freehold to be in the husband forthwith: 1 Cruise, 149, pl. 28. But the law doth not cast the dower on the widow: she takes by her own act. She has no *jus posses*

sionis, since it was not of absolute necessity that she should claim her dower, but it is of absolute necessity that the law should cast the freehold on the heir: Gilb. Ten., 26, 27. So that, by the endowment, the possession is avoided that the law cast on the heir: *Ib.* This "absolute necessity" depends altogether upon reasons of feudal policy. It is explained in Cruise's Digest, that the widow holds of the heir by fealty; the assignment of dower by the heir being a species of sub-infeudation not prohibited by the statute *Quia Emptores*, because the heir does not depart with the fee: 1 Cruise, 165, pl. 26. An estate in dower is a continuation of the husband's estate, but it is a tenancy of the heir: *Ib.* 169, pl. 8; 163, pl. 15. This distinction between the present estate in curtesy on the death of the wife, and the possible estate in dower on the death of the husband does not appear to have been present to the minds of the Legislature, when the statute was enacted which now appears in the Rev. Stat. c. 105, sec. 40, where it is said that the estate of the husband as tenant by the curtesy, or of a widow as tenant in dower shall not be affected.... but all such estates shall remain, pass, and descend, &c.

Under the copyhold system of tenure, the widow's right are preserved, as we submit they might well be by direct enactment under the socage tenure of this country. In *Vaughan* v. *Atkins*, 5 Burr, 2787, Lord Mansfield says, "the law casts the free-bench upon the widow, just as it casts the descent upon the heir." This sentence suggests the text of a short statute, which would secure incontestably the rights of the widow by providing that an estate in dower for one-third of the land should vest in the widow, at and upon the death of the husband. The effect of this would be that the widow would become at once a tenant in common with the heirs; and this is the law as declared by statute in Vermont and Connecticut. Some progress has been made in this direction by the Partition Act, which recognizes the right of the widow, irrespective of the assignment of dower (Rev. Stat., c. 101, s. 49), and which also provides that "doweresses and parties entitled to dower" may be compelled to make or suffer partition: *Ib.* see 4. This last Act in effect carries out the suggestion of Lord Loughborough in *Mundy* v. *Mundy*, 2 Ves. Jr., 124, when he asked: "Cannot a doweress come here, as a coparcener can come for a partition?"

When we think of the very slight formality required to vest a present estate in dower in the widow: that it may be done by word of mouth, without any setting apart of a specific parcel of land by metes and bounds (*Leach* v. *Shaw*, 8 Gr. 497, and *Reeve* v. *Power*, 2 Bos. & Pul, N. R., 33 Dom. Proc), we can see no reason why it should not be the law that the estate should vest, as of course, on the death of the husband.

In a succeeding paper, some considerations will be suggested, which may perhaps go to invalidate the doctrine laid down in *McDonald* v. *McIntosh*.

(To be continued.)

THE CHARITABLE SPIRIT OF THE LAW.

(Continued.)

A former article on this subject in the November number of this Journal aimed at showing how strong the presumption of English law in favour of innocence is, and how absolute is the proof that is required in order to convict a person of a criminal or illegal act. So much is this the case that Paley, in his Moral and Political Philosophy (Bk. vi. chap. ix.), complains of the state of the law in this respect as doing much harm. to the

community: (and it is in accordance with this charitable and merciful spirit, that the English law disapproves of the maxim of the civilians and canonists, *In atrocissimis leviores conjecturæ sufficient, et licet judici jure transgredi*, which Beccaria justly calls (Ess. on Crimes, chap. 13), "an inhuman maxim, dictated by the most cruel imbecility." We find the very reverse laid down in *Sarah Hobson's* case, L. C. C. 2, 261—where Holroyd, J., says, "The greater the crime the stronger is the proof required for the purpose of conviction," and Burnet in his Criminal Law of Scotland (p. 612, Ed. of 1811) speaks to the same effect.

Nor does the law presume against infringements of criminal and penal statutes only, but also against all fraud and dishonesty. Thus, in the case of *Chancellor of Oxford* v. *Bishop of Coventry*, 10 Co. 53 b. (11 Jacobi 1), we find it was resolved that "covin shall never be intended or presumed at law if it be not specially averred, *quia odiosa et inhonesta non sunt in lege præsumenda, et in facto quod se habet ad bonum et malum, magis de bono quam de malo præsumendum est.* And again, *Nullum iniquum est in jure præsumendum: Hynde's* case, 4 Co. 72 a. Accordingly in *Master* v. *Miller*, 4 T. R. 320 (1791), Buller, J., says "Fraud or felony is not to be presumed, and unless it is found by the jury the Court cannot imply it. *Minet* v. *Gibson*, 3 T. R., 481, 1 H. B. 569, is a most decisive authority for that proposition if any be wanted." And in *Middleton* v. *Barned*, 4 Exch. 241 (1851), an action of trover against some bankers for a bill of exchange, where the case turned on the question whether a clerk had duly delivered a message as ordered, it was held that the presumption that the message was duly delivered was met by one of a stronger character, viz., that the proceeding on the part of the defendants was fair and honest, and that they had a good title to the bill unless it were shown affirmatively that the message had been delivered. Again, in *Shaw* v. *Beck*, 8 East, 400 (1854), where it was attempted to prove fraud attending the execution of a certain deed, it was held (per Parke, B.), that, "the defendants who seek to set the instrument aside as fraudulent must establish fraud, upon the universal principle that every transaction in the first instance is assumed to be valid." And the same presumption against fraud applies in the case of third parties. Thus, in *Ross* v. *Hunter*, 4 T. R. 33 (1790), an action by the assured of goods against the underwriters for a loss by the barratry of the master, the Court refused to presume that the captain went out of his course by the directions of his owner, on the ground that "the Court cannot presume fraud in another person," (per Buller, J., p. 38).

So again, no species of ouster will be presumed without proof, either direct or presumptive; and possession is never considered adverse if it can be referred to a lawful title. Thus, in *Hornblower* v. *Read*, 1 East, 568 (1801), one tenant in common levying a fine of the whole, and taking the rents and profit afterwards for five years, was held no evidence of an ouster of his companion at the time of the fine levied, and Lord Kenyon said, "Without an ouster be found by the jury, the possession of one tenant in common must be taken to be the possession of all." The same point is illustrated by *Fairclaim* v. *Shackleton*, 5 Burr., 2604 (1770), and *Fishar* v. *Prosser*, 1 Cowp., 217 (1774). A strong example is *Milner* v. *Brightwen*, 10 East, 583 (1809). Here a party had taken possession of copyholds on the death of his wife, by an adverse title, and lived

more than twenty-one years afterwards, and upon its being then found that there was an old custom of the manor by which he had a right to curtesy, his possession was referred to that title, which was consistent with the title of the other party (see per Wood, V. C., in *Thomas* v. *Thomas*, 2 K. & J. 79.) This last-named case, decided in 1855, is itself in point. Here it was held that if a father has entered upon the estate of his infant children, the presumption is that he entered as their guardian and bailiff. So too in Co. Litt. sec. 375-377, it is said, "If a feoffment bee made by deed poll upon condition, and for that the condition is not performed, the feoffor entereth and getteth the possession of the deed poll, if the feoffee brings an action for this entrie against the feoffor,—when the feoffor hath the deed in hand, and is pleaded to the Court, it shall be rather intended that he cometh to the deed by lawful means, than by a wrongful mean." And the general presumption against crime, fraud, covin, and immorality is equally applicable to acts done abroad: (Best on Ev., 6th Ed., p. 538.)

Moreover, even where guilt or illegality can be established only by proving a negative, that negative must, in most cases to which no special statute is applicable, be proved, although the general rule of law devolves the burden of proof on the party holding the affirmative. An old example of this appears in *Monke* v. *Butler*, 1 Rol. 83. (12 JamesI.) Here, in a suit for tithes in the Spiritual Court, the defendant pleaded that the plaintiff had not read the Thirty-nine Articles according to the statute, and the Court put the defendant to prove it though a negative. The defendant prayed a prohibition, "que n'est possible a producer homes a jurer que il ne unque lie les articles car n'est ascun home que ad estre touts tempts al praiers." But this was refused, and the Judges, Coke and Doddridge, laid it down: "La ley presume que il lie les articles . . . et lou la ley presume l'affirmative la ley negative serra prove come si ne unque accouple en loyall matrimonie soit plede c'est negative doit estre prove." This case of *Monke* v. *Butler* is cited as a very strong case in *Powell* v. *Milburn*, 3 Wils. 355 (1772), which is itself very analogous, as is also the case of *Rex* v. *Hawkins*, 10 East, 211 (1808). In *Williams* v. *East India Co.*, 3 East, 192 (1802), the plaintiff declared the defendants had caused the loss of his ship by putting on board a dangerous commodity *without due notice*; and it was held to lie with him to prove this negative averment. So, again, in *Sisson* v. *Dixon*, 5 B. & C. 758 (1826), where a common carrier, charged with the loss of a parcel, contended that the plaintiff should have proved that the goods were duly entered at the custom house, it was held that this was not so, for that the presumption always is that the party complies with the law. And in *Rodwell* v. *Redge*, 1 C. & P. 220 (1824), when it was objected that the plaintiffs had not proved that their theatre was duly licensed, Abbott, C. J., said: "I shall presume the license from the fact that the performance went on. If it were not so, they would all be rogues and vagabonds."

The presumption against illegality appears again in that class of cases which illustrates the rule that ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning. Thus in Co. Litt. 42 a, it is said, "If tenant in taile make such a lease (*i.e.* for life) without saying for whose life, this shall be taken, but for the life of the lessor for two reasons, First, be-

cause when the construction of any act is left to the law, the law which abhorreth injury and wrong, will never so construe it, as it shall work a wrong. . . And it is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken. Secondly, the law more respecteth a lesser estate by right, than a larger estate by wrong." And again, Co. Litt, 36 a, "*Verba intentioni, non e contra, debent inservire. . . Benignæ sunt faciendæ interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quam pereat.*" And so in *Lewis* v. *Davison*, 4 M. & W. 654 (1839), where in consideration that the plaintiff would not press one J. D. for a debt, the defendant agreed that if a *ca. sa.*, should be issued against, J. D., he would surrender J. D. to the Sheriff to be arrested, it was held on demurrer, that the agreement was not necessarily illegal since it must be assumed that the defendant would obtain the arrest of J. D. by lawful means, and Lord Abinger said, "when the Act which is the subject of the contract may, according to the circumstances be lawful or unlawful, it shall not be presumed that the contract was to do the unlawful act, the contrary is the proper inference."

But the presumption in favour of innocence, strong as it is, may of course be over-ruled by stronger presumptions, if any such appear in the case. For instance it is often over-ridden by the presumption of the continuance of things in the state in which they have once been proved to exist. Thus, in *Rex* v. *Budd*, 5 Esp. 230 (45 Geo. III.) on an indictment for libelling a man in his capacity of public officer, on proof of the prosecutor having held the office previously to the publication of the libel, his continuing to do so was presumed. Another instance is *Rex* v. *Harborne*, 2 A. & E, 540 (1835). This was a case regarding the settlement of a female pauper, and it was proved that her husband, who had been previously married, had received a letter from his former wife, written from Van Diemen's land, and dated twenty-five days before he married the said female pauper. It was held that the presumption of innocence could not shut out the presumption of the continuation of life under such circumstances as appeared here, and it must be presumed that the first wife was living at the time of the second marriage. Yet how strong the former presumption is appears from the analogous case of *Rex* v. *Twining*, 2 Barn. & Ald. 386 (1819), where it was decided that the presumption of the continuance of life derived from the fact of the first husband having been shown to be alive about a year previous to the second marriage, ought not to outweigh the presumption against the commission of crimes, and Bayley, J., said: "The presumption of law is that he (*i.e.* the husband) was not alive when the consequence of his being so is that another person has committed a criminal act.' The two cases are discussed at some length in Best on Ev. 6th Ed. pp. 447-450.

In other cases the conflicting presumption *omnia præsumuntur rite esse acta* has been held to override the presumption of innocence. Thus in *Rex* v. *Gordon*, 1 L. C. L. C. 515 (1789) it was held that on an indictment for the murder of a constable, the fact of the deceased having publicly acted as constable, was *primâ facie* proof of his having been such, without producing his appointment. And in *Rex* v. *Verelst*, 3 Camp. 432 (1813) it was held,

on an indictment for perjury in taking a false oath, before a Surrogate, to be sufficient *primâ facie*, to prove that the party administering the oath acted as surrogate.

So too, the presumption of law in favour of sanity is a stronger presumption than that in favour of innocence. Thus in 8 Scott, N.R. 601 (1844), where is contained the answer of the judges to the questions propounded to them by the House of Lords in relation to the law respecting alleged crimes committed by persons afflicted with insane delusions, we find the opinion of the judges to be "that the jury ought to be told in all cases that every man is presumed to be sane, and possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction." And in his summing up in *Rex* v. *Stokes*, 3 C. & K. 188 (1848) Rolf, B. says: "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The *onus* rests on him; and the jury must be *satisfied* that he actually was insane. If the matter be left *in doubt*, it will be their duty to convict him; for every man must be presumed to be responsible for his acts till the contrary is clearly shown."

Before proceeding to adduce fresh examples of that charitable spirit which it is contended animates English law, there remain to be noticed certain apparent departures from that spirit in respect to this presumption against crime and fraud, after which it is purposed to show that the general presumption in favour of innocence extends not only to crime and fraud, but also to all vice and immorality.

(To be continued.)

LAW SOCIETY.

Michaelmas Term, 42nd Victoriæ.

The following is the Resumé of the proceedings of the Benchers during this Term, published by authority of Convocation.

Mr. Hodgins moved, seconded by Mr. Martin, that D. B. Read, Esq., Q.C., be Chairman of Convocation in the absence of the Treasurer. Carried.

The minutes of last meeting were read and approved.

The Report of the Examiners for Call was read and adopted, and the following gentlemen were called to the Bar, viz: Messrs. J. A. M. Aikins, E. L. Dickinson, D. D. Riordan, W. B. Northrup, W. H. Best, A. O. Jeffrey, J. Rollo Slaght, Walter Macdonald, J. B. Dow, Robert Hodge, B. E. Bull. and F. Pimlott Betts

The Report of the Examiners for Certificates of Fitness was read and adopted, and the certificates were issued to the following gentlemen, viz: Messrs. Aikins, Dickinson, Northrup, McDonald, Connor, Eccles, Barrett, Webster, Blake, Wright, Andrews, Towers, Kennin, and Bull.

The Report of the Examiners on the 1st and 2nd Intermediate Examinations was read and approved.

The Report of the Committee on the Preliminary Examinations was read and approved.

The Report of the Legal Education Committee on the petitions of Messrs. Hellmuth, Riordan, Taylor, Brown, and others, was received and read, and the 19th instant appointed for its consideration.

The petitions of Messrs. Lefroy, Beemer, Jex, and Orr were read and referred to Legal Education Committee.

Mr. Hector Cameron gave notice of motion for Saturday, 22nd inst., on the subject of the desirability of assisting in the formation of libraries in the County Towns.

Mr. Hector Cameron also gave notice of motion for the same day, on the subject of appointing a Committee to superintend the writing up of the Rolls of the Society.

Mr. Martin gave notice of motion for the same day, on the subject of obtaining the Statutes of the Province and Dominion at a reduced price for the members of the Society.

Mr. McCarthy gave notice of motion for same day on the subject of the annual fees of attorneys and solicitors, with a view to their reduction.

Mr. Hodgins gave notice of motion for same day, for the appointment of an Executive Committee.

The resolutions adopted by the Bar on 2nd Nov. instant, relative to the death of the Hon. R. A. Harrison, Chief Justice of Ontario, were laid before Convocation, and ordered to be entered on the minutes.

Mr. Martin moved, That the Chairmen of the Finance, Library, Reporting, and Legal Education Committees be requested to enquire as to what, or any, assistance is required by the Secretary, Sub-Treasurer, and Librarian, and the best mode of providing such assistance if required, and to report without delay.

Tuesday, 19th Nov.

The minutes of last meeting were read and approved.

The Report of the Legal Education Committee, on the petitions referred to them, was read and adopted.

The report of the Special Committee appointed to consider the subject of assistance required by the Secretary, Sub Treasurer, and Librarian, and the best mode of providing such assistance was considered, when it was moved by Mr. Blake, seconded by Mr. Crickmore, and resolved: That having regard to the Report of the Library Committee dated 5th December, 1871, which has been adopted by Convocation, and which adequately provides for the existing emergency, it is not desirable to take any action on the report of the Committee before Convocation.

The petition of W. J. Read was received and referred to Legal Education Committee.

Mr. Robertson moved, seconded by Mr. Blake, That in future no Certificates of Fitness be signed or issued to the parties entitled till after the rising of Convocation, on the day on which the order for their admission has been adopted. Carried.

Saturday, 23rd Nov. 1878.

In the absence of the Treasurer of the Society, Æmilius Irving, Esq., Q. C. was elected Chairman of Convocation.

The minutes of last meeting were read and approved.

The Report of the Legal Education Committee of 19th November instant was read and adopted.

The Report of the Finance Committee dated 22nd November, 1878, was received.

The Financial Statement for the first three-quarters of 1878 was read.

A letter from George S. Holmested, Registrar of the Court of Chancery, dated 2nd Nov. 1878, was read, which pursuant to Rule No. 15 of this Society was ordered to be entered at length upon the Journals of Convocation, which letter contained the Order of the Court of Chancery made in the matter of Adam Henry Wallbridge, one of the Solicitors of the Court, on the 2nd Oct. 1878, and the certificate of the said Court in refer-

ence to the said matter, dated 22nd October, 1878.

The letter of Mr. Morgan Lane, of Belleville, dated 4th Nov. 1878, was read and referred to the Legal Education Committee.

Mr. Hector Cameron's notice of motion in reference to the formation of Law Libraries in the County Towns was read and ordered to stand till next meeting of Convocation.

Mr. Hector Cameron's notice of motion to appoint a Committee to superintend the writing up and completion of the Roll of the Society was ordered to stand till next meeting.

Mr. Martin moved that the Reporting Committee be requested to make enquiry as to what arrangement can be made with the Dominion and Ontario Governments for the supply of the Statutes to the Members of the profession at a reduced price.

Ordered that the matter be referred to the Reporting Committee for consideration.

In pursuance of a notice given by Mr. D'Alton McCarthy on the 18th instant, it was moved by Mr. Mackelcan, seconded by Mr. Robertson, and resolved That the sum of fifteen dollars be the fee payable by each attorney or solicitor for his annual certificate in Michaelmas Term of each year, under Rule 143 of this Society, such sum of fifteen dollars not to include the fee of two dollars per annum payable by each barrister under Rule 81 of this Society, and that if any fees in excess of said sum of fifteen dollars shall have been paid in or shall be paid in before the first day of Hilary Term next, for the annual certificate for the now ensuing year, such excess shall be refunded.

The above resolution was read a first and second time.

Mr. Hodgins' notice of motion relative to the appointment of an Executive Committee was ordered to stand until the next meeting of Convocation.

Dr. Smith, on behalf of Mr. Bethune, gave notice that he would, on the next meeting of Convocation, move to amend Rule 148, by adding thereto the following words, that is to say: "And the Secretary of the Society shall, after the receipt of the Order of any of the Superior Courts and the entry thereof upon the Books of Convocation, notify by letter each of the Judges of the Superior Courts, and the Judge of the County Court of the County in which the attorney or solicitor affected by the said Order has practised, that such Order has been made."

Dr. Smith, again on behalf of Mr. Bethune, gave notice of motion for Wednesday, the 27th November instant, to amend the Rules of the Society as to the admission and enrolment as attorneys and solicitors of members of the Bar of England, Ireland, or Scotland.

Mr. Martin gave notice that he would on the last Friday of Michaelmas Term, move that the Resolution of Convocation adopting the Report of the Library Committee dated 5th December, 1871, be rescinded, and that the Report of the Committee on the 18th instant, to consider the subject of whether further assistance was required by the Sub-Treasurer be adopted and carried out.

Mr. Boultbee's petition was received and referred to the Legal Education Committee.

Convocation adjourned until Wednesday, the 27th instant.

Wednesday, Nov. 27th.

Convocation met, pursuant to motion at last meeting.

In the absence of the Treasurer, Æmilius Irving, Esq., Q.C., was elected Chairman of Convocation.

The minutes of last meeting were read and confirmed.

The petitions of F. J. Dunbar, J. G. Kelly and others were referred to the Legal Education Committee.

Two letters as to exchange of Reports received from the State Librarian of Iowa were referred to the Library Committee.

Mr. Mackelcan moved, seconded by Mr. Robertson, that the Rule which was read a first and second time at the last meeting of Convocation in reference to the reduction of the annual fee for Certificates from $20 to $15, be read a third time.

The said Rule was then read a third time.

Mr. Hodgins' notice of motion for the appointment of an Executive Committee was ordered to stand to the next meeting of Convocation.

Upon the consideration of the notice of motion given by Mr. Bethune, on the 23rd instant, relating to Rule No. 158,

It was proposed by Mr. Blake, and seconded by Mr. Mackelcan, that the following be adopted as a Rule of the Society:

"The Secretary of the Society shall, after the entry upon the Journals of Convocation of the Order of any of the Superior Courts ordering a member of this Society to be struck off the Roll of Attorneys or Solicitors of such Courts, notify by letter each of the Judges of the Superior Courts, and the Judges of the County Courts of the Counties in which the member of the Society affected by the said Order has usually practised, and also the said member himself that the said Order has been made and transmitted to the Treasurer of the Society, and the Secretary shall enclose therein, for the information of the person addressed, a copy of the General Rule of the Society, No. 148."

Which was carried, and upon motion was read a second time, and ordered to be read a third time at the next meeting of Convocation.

Mr. Bethune's notice of motion of the 23rd instant, relative to the admission as Attorneys of persons called to the Bar of any of the Superior Courts of England, Ireland or Scotland was ordered to stand for the next meeting of Convocation.

Mr. Cameron's notices of motion relative to the establishment of Libraries in the County Towns, and relative to the appointment of a Committee to superintend the completion of the Rolls of the Society were ordered to stand for the next meeting of Convocation.

Mr. Blake gave notice of motion for the next meeting of Convocation to add to Rule 3 of the Order of Proceedings in Convocation the words following:

"And that every such petition shall forthwith, on its receipt by the Secretary stand referred to the Legal Education Committee, and shall be transmitted by the Secretary to the Chairman of that Committee for its Report."

Messrs. Read, Crickmore, Hodgins, and Robertson were appointed a Committee to superintend the examinations of Mr. Jex and Mr. D. B. Robertson, according to the practice of Convocation.

December 6th, 1878.

In the absence of the Treasurer, D. B. Read, Esq., Q.C., was elected chairman of Convocation.

The minutes of last meeting were read and approved.

The Report of the Legal Education Committee on the Petitions referred to them was read and adopted.

The Report of the Committee on Reporting was read and adopted.

The Report of the Examiners on the Scholarship Examinations was read and adopted.

A communication was received from Clarke Gamble, Esq., in reference to the Portraits of the Chief-Justices.

A communication from the Hon. R. W. Scott was received and referred to the Finance Committee.

A communication from J. B. Read, Esq., in reference to the Annual Certificates, was referred to the same Committee.

A communication from G. M. Evans, Esq., in reference to a bust of the Hon. Sir John Beverley Robinson, was referred to the Library Committee.

A letter feom the Hon. M. C. Cameron was read resigning his seat as a Bencher of the Society, on the occasion of his appointment to a Judgeship in the Court of Queen's Bench.

The Secretary was directed to call a meeting of the Benchers for the first Tuesday of next term, to elect a Bencher to fill the vacancy.

Mr. Hodgins withdrew his motion on the subject of an Executive Committee.

Mr. Scott entered and took his seat as a Bencher.

Mr. Bethune's motion on the subject of the admission of English, Scotch and Irish Barristers as Attornies and Solicitors was discussed, when Mr. Hodgins moved an amendment, which was lost. The original motion was then put and lost.

Dr. Smith's motion to amend Rule 148 was read a third time and passed.

Mr. Hector Cameron's motion relating to the Roll of the Society was ordered to stand till next Term.

Mr. Martin's motion as to Assistant in Library stands adjourned till First Tuesday of next Term.

SELECTIONS.

WESTERN LAW.

We have recently been taking a tour, for our recreation and health, in the far west, by the vehicle of the legal reports of some of the new occidental States and Territories. This expedition has given us some new ideas of law, and of manners and customs. On our return our heads are so full of gold dust, gulches, quartz mills, ditches, mining claims, discovery shafts, and the like, that we find it a little difficult to settle down to the more ordinary and less wonderful subjects of litigation in our eastern communities. Some of the law books of the new west are quite breezy and entertaining. There is, to be sure, a good deal of elaboration in the opinions on questions which are firmly and familiarly settled in the older communities this side the Alleghanies, and there is a perfectly surprising amount of statutory construction, all of which is characteristic of new communities. We have noted a few odd and amusing cases which we thought would give our readers some idea of the state of society in the bonanza country.

In *Kennon* v. *King*, 2 Montana, 437, it was ruled, that it is a question for the court and not for the jury to decide whether the game of cards, usually denominated "poker" is a game of chance and within the statute, requiring the keepers of houses where games of chance are played for money, to pay license therefor. In this case the court charged the jury that the game of "poker," as played with cards, is a game of chance. The court say: "Juries cannot be permitted to pervert, vary, or change the established meaning or use of the English language. And it is improper to submit to a jury, upon the testimony of witnesses, the meaning of an unambiguous word in common use. Experts may explain the meaning of 'technical or ambiguous words,' but the word 'poker,' as applied to a game of cards, has, so far as we know, but one meaning, and its definition was correctly given in the instructions of the court. We see no reason for calling proof as to the meaning of this word that would not apply, with

equal propriety, to the words deed, lease, contract, river, city, church, or any word in general use, and whose meaning is universally understood." Now it is a little singular that we do not find the word "poker," as a game of cards, in Webster's dictionary of 1856, although it does appear, as an Americanism, in the edition of 1870. It is, therefore, evident that the word in question is an interloper in the good society of the other words cited by the court. Besides, an accomplished card player at our elbow (we know nothing of the game ourselves) suggests that poker is not a game of chance, but rather a game of "cheek," or "bluff," so to speak. This matter ought to be referred for final adjudication to General Schenck. But the judge ought not to associate the word "church" with the word "poker."

In *Milligan* v. *Jefferson County*, 2 Montana, 543, it is held that calves are not heifers or steers. The court announce the point at issue as follows: "Are sucking calves the subject of taxation under the Revenue Act?" The court continue: "It is urged that the sixteenth section of the Act qualifies the foregoing provisions and excludes calves from taxation until they are one year old. It is said that calves under one year of age are not specified in the list. There is no specification of calves. 'Heifers and steers between one and two years old' are specified. Does the term 'heifers and steers' include calves? A heifer is a young cow: Webster's Dict. In defining the word 'yearling,' Webster uses as an illustration the term 'yearling heifer.' A heifer is a young cow which has not had a calf: 1 Bouv. L. D., tit. 'Heifer.' A steer is 'especially a castrated taurine male from two to four years old:' Webster's Dict. According to Webster, the Legislature used a proper phrase in speaking of heifers between one and two years old, and an improper one in referring to steers of that age. Our statute provides that 'all words and phrases shall be understood and construed according to the approved and common usage of the language:' Cod. Sts. 389, § 1. Taking this as a guide, I am sure that the term 'heifer' or 'steer' nowhere includes calf. The words describe animals of the bovine species which have advanced to an age beyond that of a calf. When one of these animals has reached the age of one year, in this territory, it is usually called a yearling; and if a more definite description is desired, it is termed a yearling heifer or a yearling steer. This is probably the manner in which our legislative assembly intended to classify cattle of that age, and calves would not properly come under the head of 'heifers and steers between one and two years old.'"

In *Charles* v. *People's Insurance Company*, 3 Colorado, 419, we find it decided that it is not commendable practice to stop the trial of a cause, and adjourn it, on the ground that the plaintiff is intoxicated. We have a suspicion that adherence to this doctrine would put a good many plaintiffs in Colorado at a disadvantage.

Before we went west (in manner and form aforesaid) we had been led to suppose that they did not tolerate actions of libel, slander, and assault and battery out there, but that if any gentleman deemed himself libelled, slandered, or assaulted and battered, he usually took the administration of the law into his own hands, and shot the offender at the first convenient opportunity. But we find a libel case, *Downing* v. *Brown*, 3 Colorado, 571, and a most aggravated one, too, the offender being the editor of the *Denver Tribune*, and having published in his newspaper the "following false, scandalous, malicious, and defamatory matter, of and concerning the plaintiff, to wit:

> 'My conscience (meaning the conscience of the the said plaintiff) hath a thousand several tongues,
> And every tongue brings in a several tale,
> And every tale condemns me (meaning the said plaintiff) for a villain.
> Perjury, foul perjury in the highest degree;
> Murder, stern murder, in the direst degree;
> All several sins, all used in each degree;
> Throng to the bar crying all, Guilty! Guilty!'
> —Richard III.

"And yet Jack Downing (meaning the said plaintiff) affects to laugh with a low guttural sound, thus: Ha! ha!! ha!!! 'Thereby then and there meaning that the said plaintiff was and is guilty of the crime of perjury, and that he, the said plaintiff, being arraigned at

the bar of his own conscience, had then and there pleaded guilty to the charge of the crime of perjury.'" Another count charged that the imputation was murder. The same editor had also pleasantly alluded to the plaintiff as a second "Boss Tweed" and a ballot-box stuffer. In spite of all this abuse the defendant had a verdict. So, it seems, it would have been more effectual for the plaintiff to have whipped or shot the editor. But the court set aside the verdict on technical grounds, and the plaintiff has another chance.

Again, in *Moynahan* v. *People*, 3 Colorado, 367, an indictment for the murder of Patrick Fitz Patrick, where the true name was Patrick Fitzpatrick, was held fatally defective. The court observed: "Suppose the indictment to charge larceny of the goods of John King Mann, when in truth the name of the owner is John Kingman, or an assault upon William Green Field, or Henry Young Blood, where the surname of the injured person is, in fact, Greenfield or Youngblood; no one would for a moment suppose that a conviction upon such averment and such proof could be supported. The surname of the deceased, as proven at the trial, is of similar formation with some of those which I have instanced. The first syllable was originally, it is believed, a mere prefix, the paternal name retaining independent form, and conveying a distinct idea. At the present day, however, the two are invariably written, pronounced and accepted as one name. I am unable, at least, to find in the voluminous tables of cases which accompany the digests of the reports of this country, or in any of the gazetteers, directories, or tables of names, which are accessible to me, any instance where they are written as the name of the deceased person is written in this indictment. Moreover, what here appears to be written as the middle name is occasionally found as a Christian name. It has also attained to the dignity of a surname, and, with a various orthography, is borne by a family which appears to be widely disseminated, as, if necessary, may be established by reference to the judicial reports: *Commonwealth* v. *Fitz*, 11 Mass. 540; *Brown* v. *Fitz*, 13 N. H. 283; *Alden* v. *Fitts*, 12 Shep. 238; *Fitts* v. *Cook*, 5 Cush, 596; *Aoston* v. *Fitz*, 4 id. 365; *Kendall* v. *Fittz*, 2 Foster; *Fitts* v. *Fitts*, 14 Texas, 443; *Harwell* v. *Fitts*, 20 Ga. 723; *Fitts* v. *Brown*, 20 N. H. 393; *Little* v. *Fitts*, 33 Ala. 343; *Fitts* v. *Whitney*, 32 Vt. 589; *Moore* v. *Fitz*, 15 Ind. 43; *Robbins* v. *Fitz*, 33 N. Y. 420; *Fitz* v. *Minnesota, etc., R. R. Co.*, 11 Minn. 414; *Fitz* v. *Reichard*, 20 La. Ann. 549; *Fitts* v. *Davis*, 42 Ill. 301; *Fitts* v. *Morse*, 103 Mass. 164. The name which follows is also a well known family name." Possibly the court might have been disposed to hold differently if they had recalled the fact that the prefix "Fitz" means "son," and so, in whatever shape it is written "Fitzpatrick" means "son of Patrick."

In *Eldred* v. *Malloy*, 2 Colorado, 320, it was held that a promise to pay a sum of money upon the condition that a railroad should be built to a place named on or before a specified day, is void as a wager. The court sternly observe: "The courts of this territory have enough to do without devoting their time to the solution of questions arising out of idle bets made on dog and cock fights, horse races, the speed of ox trains, the construction of railroads, the number on a dice or the character of a card that may be turned up. If we enter upon the work of settling bets made by gamblers in one case, especially on the time when the Colorado Central railroad reaches Golden, or when it will reach Georgetown, we may well despair of ever finding time for the dispatch of those weightier matters which affect the personal and property rights of the respectable people in this territory. If the gate is once opened for this kind of litigation, it is more than probable that we may be overrun with questions arising out of bets. The spirit of our laws discountenance gambling. Penalties are prescribed against gaming, and I can see no difference in principle in the bet that the faro dealer will turn up a jack in the next turn, and the bet that the railroad will be built to Table Mountain in so many days."

Our fear that there is a vein of irreligion in the western judges, excited by the association of the word "church"

with the word "poker," in the case on which we have commented, is confirmed by the following passage from the *Western Union Telegraph Co.* v. *Eyser*, 2 Colorado, 161: "We recognize the fact that corporations enter into almost all the concerns of life, political, financial, eleemosynary. They build churches, erect colleges, construct railroads, operate mines, run newspapers, distribute charities, and in some instances claim to be the sole custodians of the keys that unlock the gates of glory."

The editor of the *Rocky Mountain News*, as well as the editor of the *Denver Tribune*, must be a little careful of his utterances. Mr. Martin sued Mr. Byers, the *News* man, for publishing of a jury, of which Mr. Martin had been a member, the following: "We are not a little surprised at Judge Wells' lenient charge in the case. We are still more at the infamous verdict of the jury. . . . We cannot express the contempt which should be felt for those twelve men, who have thus not only offended public opinion, but have done injustice to their oaths." It was held that Mr. Martin might reasonably claim one-twelfth of this reprimand as intended for himself, and maintain an action of libel.—*Albany Law Journal.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS.

IN BANCO, MICH. TERM.

DECEMBER 7, 1878.

REGINA v. DUFF.

Bigamy—Former marriage—Evidence—Sufficiency.

On an indictment for bigamy, as evidence of the alleged prior marriage, a deed was produced, made by the prisoner some six years ago, after the alleged marriage, which contained a statement of his having a wife in England, named Sarah Duff, giving her address, and which purported to convey certain property to trustees in trust for the said wife. B., one of the trustees, proved that at the time of the execution of the deed, the prisoner made a similar statement to him; and B's wife proved that she heard the prisoner ask her husband to act as trustee for his wife in England.

Held, that this did not constitute sufficient evidence of the alleged prior marriage to warrant a conviction for bigamy.

J. G. Scott, Q.C., for the Crown.

Robertson, Q.C., for the prisoner.

MACDONALD v. TOWNSHIP OF DORCHESTER.

Bridge—Want of repair—Liability.

In an action by the plaintiff against the defendants, for damages sustained by him, by the breaking through of a bridge in the township, it appeared that the accident was caused through the centre one of three beams or string pieces, of which the bridge was composed, giving way by the weight of the plaintiff's horses alone, without the buggy to which they were attached, as they were stepping on to the bridge. It also appeared that the spring piece, at the place where it passed, was to two-thirds of its diameter, and at the outside, quite rotten; and that its condition was either not ascertained by the persons whose duty it was to inspect the bridge, and see that it was kept in proper repair, or, if ascertained, it had not been replaced by another sound one.

Held, that the defendants were liable.

O'Sullivan, for the plaintiff.

J. K. Kerr, Q.C., for the defendants.

DECEMBER 11, 1878.

RE NIAGARA ELECTION PETITION.

Preliminary objections—Jurisdiction—Procedure—Ultra Vires—37 Vict. cap. 10, D.

To a petition filed against the return of the respondent as member of the House of Commons, the respondent filed certain preliminary objections, alleging in substance that the Act 37 Vic. ch. 10, D. which enacted that the trial of controverted elections to the House of Commons should be referred to the Court of Common Pleas, and the other courts named in this Province,

was *ultra vires* of the Dominion Government.

Held, that the Dominion Parliament could lawfully empower and require the court to act in the matter, and the objection was disallowed.

A further preliminary objection alleged that even if the trials were lawfully referred to the court, there was no power to enact the procedure to govern the court in relation thereto.

Held (Wilson, C. J., diss.), that this must be disallowed.

Per Wilson, C. J. that there was no power to enact such procedure, and that the court had no procedure of its own applicable to the matter; that there was therefore no authority to file the petition, and that it should be removed from the files.

Semble (also per Wilson, C. J.), that under R. S. O. ch. 49, sec. 45, the court might have framed rules adopting the procedure in question, which, if done, might be applicable to future petitions.

Semble (also per Wilson, C. J.), that the Provincial Legislature should validate and authorize the courts named to entertain and dispose of petitions in the manner indicated in the Act, as if the procedure had been specially enacted by such legislature, or specially allowed and provided for by the courts under their inherent or statutory jurisdiction.

Robinson, Q.C., and *O'Brien* for the petitioner.

Hodgins, Q.C., for the respondent.

Re South Ontario Election Petition.

There were the same objections and judgment as in the above.

Hector Cameron, Q.C., for the petitioner.

J. D. Edgar, for the respondent.

Re West Hastings Election Petition.

In this case there were also the same objections and judgment.

Hector Cameron, Q.C., and *Howard*, for the petitioners.

Bethune, Q.C., for the respondent.

Re South Huron Election Case.

Corrupt Practices—Status of petitioner.

In this case also there were the same objections and judgment.

There were also the further preliminary objections, that the petitioner was (1), at the said election and during eight years previous to the filing of the petition and (2), at and prior to such election, guilty of corrupt practices and incapable of voting at said election, whereby he was disqualified from being a petitioner.

Held, that these objections must also be disallowed.

H. J. Scott, for the petitioner.

Hodgins, Q.C., for the respondent.

CHANCERY.

Blake, V.C.] [Nov. 26, 1878.

St. Michael's College v. Merrick.

Practice—Costs.

Costs of interlocutory motions were reserved until the hearing or other disposition of the case, and on a subsequent allowance of a demurrer filed by one of the defendants, the Court was not asked to include such costs. The final result of the suit was to find such demurring defendant entitled to the fund in question in the cause, and on a motion made by the defendant for an order to have these costs allowed, the Court granted the application, but under the circumstances without costs.

Blake, V.C.] [Nov. 26, 1878.

McKay v. Ferguson.

Sale for taxes.—List of lands liable for sale. Setting aside sale.

Where the clerk of a township had omitted to keep in his office the list of lands liable to sale, furnished to him by the treasurer of the municipality, or to deliver to the assessor a copy thereof—as provided by sec. 108 of ch. 180, R. S. O., in consequence of which omission, a lot worth $1,500 or $1,600, had been sold for $5.53 taxes due thereon; the Court on a bill filed impeaching the sale, set the same aside with costs, less the amount of taxes paid, interest and expenses attending the same.

QUEEN'S BENCH.

IN BANCO, MICH. TERM.

December 16, 1878.

Bennett and Wife v. Corporation of the County of York.

Con. Stat. Can. cap. 28, schedule A.—Kingston Road—Liability of County for state of.

Con. Stat. Can., ch. 28, Schedule A., declares that the Kingston Road, east of the River Don, shall not be held to be within the City of Toronto or liberties thereof, but shall remain under the control of the Commissioner of Public Works, or of any party to whom it may be transferred by Order of the Governor in Council. The defendants purchased this road from the Government, and with the permission of defendants, express or implied, the city put down a sidewalk upon it.

Held, that defendants were liable for the state of the road and sidewalk, and a verdict being rendered in favour of the plaintiffs, in consequence of an injury sustained by a female plaintiff, in falling on the sidewalk which was out of repair, the Court refused to interfere.

Donovan, for plaintiff.

J. K. Kerr, Q.C., *contra*.

VACATION COURT.

Cameron, J.] [Nov. 22, 1878.

Parkinson v. Thompson.

Costs of the Day—Order by Clerk of Crown and Pleas—Appeal from, to Court—R. S. O., Ch. 39, sec. 31.

Plaintiff being ready to proceed with his case at the Assizes when called on, defendant applied for a postponement, to which plaintiff did not object, though anxious to have the case disposed of. On the following day, when the case was again called on, plaintiff was not ready, owing to the absence of a witness, but the Judge insisted upon the case proceeding, whereupon the plaintiff withdrew the record to avoid a nonsuit.

Held, that defendant was entitled to the costs of the day, and an order made by the Clerk of the Crown and Pleas, setting aside a side-bar rule therefor, was accordingly rescinded.

Held, also, that the Single Court was not precluded from disposing of an application to rescind such order, on the ground that no application for the purpose had been made to a Judge in Chambers within four days after the making of the order, pursuant to the rule of Court of Hilary Term, 1870, the exception contained in sec. 31 of cap. 39, R. S. O., merely providing an additional or more speedy mode of appeal in that respect, and not taking away the right of resort to the Court for the purpose.

F. Osler, for plaintiff.

H. J. Scott, contra.

Armour, J.] [Nov. 22, 1878.

In re the Township of North Norwich and the Village of Norwich.

Division of Municipality—Bonus to Railway—Arbitration.

On a division of the Township of North Norwich, constituting a certain portion of it into a village, an arbitration took place under the Municipal Act relating to a separation of a union of townships.

Armour, J., *held*, that the disposition of the respective liabilities as to a bonus to a Railway Company, given under a by-law of the County of Oxford, within which the Township of North Norwich is situated was within the powers of the arbitrators, and properly dealt with by them.

Robinson, Q.C., for the award.

Bethune, Q.C., Contra.

COURT OF APPEAL.

From Q.B.] [Dec. 6, 1878.

Howe v. Hamilton, &c., Ry. Co.

Negligence—Evidence of.

The defendants were empowered by the Corporation of the City of Hamilton to use Ferguson Avenue in that city for the purposes of their railway. The plaintiff, who

was driving, on arriving at Barton Street, which crosses Ferguson Avenue on a level, discovered that there was a freight train across the street, facing southward, and stopped his horse about 150 feet from it. Presently a pilot engine came down to the head of the train to assist it up the grade, but immediately upon the arrival of the pilot engine it was discovered that firewood was required for its use, and the train at once moved to the north to allow the pilot engine to go to the woodshed, which was situated to the north of Barton Street. The train had gone no farther than the other side of Barton Street, about 15 or 20 feet, when the plaintiff drove on his horse and attempted to cross, but the horse shied at the pilot engine, which had remained stationary, and the plaintiff was thrown out and injured.

Held, reversing the judgment of the Queen's Bench, that there was no evidence of negligence which should have been submitted to a jury.

Held, also, that under sec. 21 of R. S. O., the Corporation of the City of Hamilton had power to allow the defendants to run their railway along Ferguson Avenue.

C. Robinson, Q.C., (*Walker* with him) for appellants.

Osler, Q.C., (with him *Teetzel*) for the respondents.

Appeal allowed.

From C. C., York.] [Dec. 6, 1878.

McLeish v. Howard.

Action against Division Court Clerk for money had and received.

The defendant, Clerk of the Division Court of York, sent a transcript of the entry of a judgment recovered therein by the plaintiff to one M., the Division Court Clerk of Essex, with directions to remit all moneys which he should receive under the transcript by Post-Office order or by cheque. M., having recovered the money, paid it into his own account at McG. Bros., private bankers, and sent their cheque to the defendant for the amount, which he acknowledged by a postal card in the following words :—" McLeish v. Richards. Received from the Clerk of the D. C., Windsor, $70.40." It was shown that M. was accustomed to remit money to the defendant by the cheque of McG. Bros. Before the cheque was presented, McG. Bros. failed, and the plaintiff sued the defendant for the money.

Held, reversing the judgment of the County Court, that the cheque and receipt operated as payment as between M. and the defendant, and that the plaintiff was entitled to recover the amount from the defendant as "money received to his use." *Held*, also, following *Dale* v. *Cool*, 6 C. P., 544, that no notice of action is required in an action against a Division Court Clerk for money had and received.

Rose for the appellant.

Osler (with him *A. Galt*) for the respondent.

Appeal allowed.

From C.P.] [Dec. 6, 1878.

McArthur v. Southwold.

By law—Ingress and Egress—Closing up road—Compensation.

Held (reversing the judgment of the Common Pleas) that section 504, R. S. O., c. 174, only applies to cases where the only mode of egress and ingress was over the road closed up, and not where there is already another existing way of access to the land in question.

Held, also, that it is not a condition precedent under the above section that compensation should be provided for in the by-law closing up the road.

Becher, Q.C., (*Street* with him) for the appellant.

Hodgins, Q.C., (*Spragge* with him) for the respondent.

Appeal allowed.

From C.P.] [Dec. 6, 1878.

Burnham v. Waddell.

Distress—Purchase by landlord—Sale of goods—Change of possession.

The plaintiff caused the goods in question to be distrained for rent in arrear of a farm, and after an unsuccessful attempt by the bailiff to sell them they were sold, with the tenant's consent, to the plaintiff, and one

P. was put in charge. He, however, allowed the tenant to remain in possession as before. The goods were subsequently seized and sold by the Sheriff, under execution against the tenants, when the plaintiff brought trover.

Held, affirming the judgment of the Common Pleas, that he could not, as landlord, claim as purchaser at the bailiff's sale; nor could he claim as vendee of the tenant, it appearing that there was no registered bill of sale, nor any actual or continued change of possession.

H. Cameron, Q.C., for the appellant.

C. Robinson, Q.C., for the respondent.

Appeal dismissed.

From C. C. Grey.] [Dec. 6, 1878.

Sloan v. Maughan.

Chattel mortgage—Statement and affidavit on renewal.

Held, affirming the decision of the County Court, that where the statement and affidavit filed upon renewal of a chattel mortgage upon being read together, give all the information required by R. S. O., c. 119, sec. 10, the renewal is sufficient.

Morrison for the appellant.

Lane for the respondent.

Appeal dismissed.

From Chy.] [Dec. 6, 1878.

Keily v. Keily et al.

Corporation—Parties—Demurrer--Pleading.

The Act of incorporation of the Toronto Street Railway Company provided that there should not be less than three directors, &c., each of whom should be a shareholder. The corporation consisted of three shareholders, who were the directors of the Company. Upon the death of one of them a meeting was called to appoint a new director, when one S., to whom the deceased director had bequeathed his shares was declared elected by one of the two remaining directors, although the other director refused to concur in the appointment.

Held, upon demurrer to a bill filed to declare the election invalid and for other relief, reversing the decree of Proudfoot, V. C., that no election was needed to make S. a shareholder as there were only three shareholders, each of whom was qualified to be a director.

Held also, that the demurring defendants were not restricted to the statements in the bill of the Acts under which they were incorporated, but that they could refer to the Statutes as printed in the Statute Book

The Attorney-General, and *Biggar* for the appellants.

Blake, Q.C., and *W. Cassels*, for the respondent.

Appeal allowed.

From Chy.] [Dec. 6, 1878.

Goyeau & Great Western Railway Company.

Railway terminus—Land conveyed on condition.

The plaintiff, on the representation of parties that they had given land to the defendants for the purpose of having the terminus of the railway at Windsor, conveyed lot 83 to the defendants in 1847, by a deed wherein it was expressed that the same had been selected by the Company "for the purpose of establishing the western terminus of their road thereon, and the execution of which constituted the sole consideration for this grant. "At the time the plaintiff made this deed, he knew that one H. had conveyed lot No. 84 to the Company on exactly the same condition. In 1853 the Company built a passenger station on lot 83, and a freight house partly on lot 83 and partly on 84, which were destroyed by fire, and a passenger station was afterwards built partly on lots 83 and 84, and a freight house on 84, which the Company continued to use until lately, when they built a passenger station about a mile from the original one. It was shewn that the business of the terminus could not be conducted on so small a space as lot 83, the buildings on lots 83 and 84 being still used for freight alone. The evidence did not show that he lost any advantage by its removal which he looked for when he made the deed, which was to keep the terminus at Windsor.

a bill filed for the specific performance of the agreement,

Held, reversing the decree of Spragge, C. that the terminus and depot were not confined to buildings alone, but extended to the whole premises necessary for conducting the business of a terminus, and that upon the true construction of the deed the plaintiff was only entitled to have lot 83 included in the terminus and depot, and had no right to have all the buildings or any particular building erected on lot 83.

Per Patterson, J. A., that even if the deed be read as requiring the establishment of buildings on the lot in question, that duty had been sufficiently fulfilled.

J. A. Boyd, Q. C., for the appellant.

Bethune, Q.C., and *C. Moss* for the respondent.

Appeal allowed.

From Q.B.] [Dec. 23, 1878.

Milloy v. Kerr et al.

Warehouse receipts—34 *Vict. c. 5. D.*

At the request of the Consolidated Bank to whom the Canada Car Company owed a large amount of money, the plaintiff consented to act as a warehouseman to the company for the purpose of storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted him a lease of a portion of their premises upon which the car wheels and pig iron lay for a year, in consideration of $5. The Consolidated Bank then gave the plaintiff a written guarantee that the car wheels and iron now stored with him as warehouseman should be forthcoming whenever required, and he thereupon issued a warehouse receipt to the company for the property, which they endorsed to the Standard Bank, and obtained an advance thereon which they paid to the Consolidated Bank.

Shortly afterwards an attachment in insolvency issued against the company, and the defendants, as their assignees in insolvency, took possession of the goods covered by this receipt, claiming them as part of the estate.

It appeared that the plaintiff was a warehouseman carrying on business in another part of the city; that he only acquired this land for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank; that he used it for no other purpose; that he had not seen the property himself, but had merely sent his foreman to examine it before giving the receipt.

Held, affirming the judgment of the Queen's Bench, that the plaintiff was not entitled to recover, as he was not a warehouseman of these goods within the meaning of 34 Vict., c. 5, D.

M. C. Cameron, Q.C., and *J. K. Kerr*, Q.C., for the appellants.

C. Robinson, Q.C., with him *G. Kerr*, Jr., for the respondents.

Appeal dismissed.

From Chy.] [Dec. 23, 1878.

Trust & Loan Co., v. Clarke et al.

Construction of deed—Life estate—Trust—Costs.

One C., a lawyer, mortgaged certain property to the plaintiffs. When searching the title to this property the Company's solicitor found that a deed—made in 1848 between C. and his mother, after reciting that C. was his father's executor, and that all the property, real and personal, was devised to him in trust for his mother for life, and after her decease in trust for his sisters, the defendants, and that he was indebted to the said trust fund in the sum of £1200, and was "desirous of securing the same in accordance with the provisions of the said will" proceeded to grant the property in question "unto the said party of the second part *forever*." Upon inquiry by the plaintiffs' solicitor, C. informed him that the deed was only intended to convey a life estate to his mother who was then dead. The Company having contracted to sell this property after C's death, an objection to the title was raised on account of the deed of 1848. Proceedings were thereupon taken by them to quiet the title, and the sisters were made claimants.

No evidence was given to show what the real agreement between the parties to the

deed was. One of the sisters swore that certain payments were made to her by C. after her mother's death, but the evidence failed to establish that the rents as such were paid to her—it merely showed that they were made as a beneficiary under her father's will.

Held, reversing the decision of Proudfoot, V.C., that under the operative words of the deed a life estate merely passed, and that their effect could not be enlarged by the covenants, which were in the short form.

Held also, that although Equity has ample power to supply words of inheritance in a conveyance, no case was established for the reformation of the deed.

Held also, that even if C.'s evidence had been satisfactory, being that of one of the litigants and uncorroborated, it could not be made the foundation of a decree after C.'s death.

Held also, that the trust, if any, declared by the deed was an implied trust, and the Statute of Limitations was therefore a bar.

Held also, that inasmuch as the litigation was for the purpose of establishing the appellants' title, and as the claimants were brought into Court not of their own motion they should not be charged with any costs in this Court or the Court of Chancery.

Bethune, Q.C., for the appellants.

Murray and *Spragge* for the respondents.

Appeal allowed.

From C. P.] [Dec. 23, 1878.

GAGHAN v. THE ST. LAWRENCE AND OTTAWA RAILWAY CO.

Conversion of goods—Asportation.

The plaintiff, at Guelph, sold to B. & Co., at Ottawa, 65 barrels of pork, and shipped it by the Great Western Railway Company, the shipping receipt acknowledging the receipt of the same, addressed to the plaintiff's order at Prescott, and to notify B. & Co. at Ottawa. The pork was carried by Great Western Railway and steamer Passport to Prescott, her manifest shewing a delivery there into the defendants' charge, and stating that the plaintiff was owner, and that B. & Co. were to be notified. B. & Co. were large dealers in Ottawa, and all goods for them, or in which they appeared interested, were, by arrangements with the defendants, sent on to Ottawa. This pork was accordingly sent on, and inspected by B. & Co., who refused to accept it. The plaintiff, who was fully aware of all that had occurred, and that the pork was then at Ottawa, swore that he demanded the pork from the defendants agent at Prescott, and, at the same time, requested him to try and get B. & Co. to accept it; but the evidence of the demand was vague, and seemed rather to be a demand that it should be brought back to Prescott: and an absolute refusal was not shewn. It further appeared that afterwards, and before this action was brought, the defendants offered the plaintiff his pork at Prescott.

Held, affirming the judgment of the Common Pleas, that the asportation of the pork to Ottawa did not constitute a conversion. *Held*, also, that there was not sufficient proof of a demand and refusal to prove a conversion; but *semble* that even if such had been proved, an action of trover could not be maintained after the subsequent offer to give him the pork at Prescott.

McMichael, Q.C., for the appellants.

Becher, Q.C. (with him *Street*) for the respondent.

Appeal dismissed.

From Chy.] [Dec. 23, 1878.

WARSWICK v. CANADA FIRE AND MARINE INSURANCE CO.

Fire insurance—Condition—Warranty.

The plaintiff, who resided at a distance from a mill on which he held a mechanic's lien, applied to the agent of the defendants to effect an insurance thereon. One of the questions put to the applicant was, "Is a watch kept on the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge at night?" His answer thereto was, "The building is never left alone, there being always a watchman left in the build

ing when not running." At the foot of the application was a condition that the foregoing was a full and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property so far as was known to the applicant, and material to the risk. The policy which issued thereon mentioned the application in these terms, "Special reference being made to the assured's application, which is his warranty and a part hereof." One of the conditions of the policy provided that any changes to avoid the policy must be material to the risk and within the control or knowledge of the insured. When the application was made a watchman was kept on the premises, but after the issue of the policy, and without the knowledge of the assured, was discontinued.

Held (affirming the decree of Proudfoot, V.C.) that the answer was not a warranty that a watchman would be kept during the existence of the policy, but merely a representation as to an existing state of things at the date of the application.

Held, also, that even if the withdrawal of the watchman was a change material to the risk, the assured was not responsible, as it was not within his control or knowledge.

Osler, Q.C., (with him *G. Patterson*) for the appellant.

Blake, Q.C., and *J. K. Kerr*, Q.C., for the respondent.

Appeal dismissed.

From Q. B.]

BARNARDS' BANKING CO. v. REYNOLDS.

Joint Stock Company—Jurisdiction.

The plaintiffs, a company formed and registered in England under "The Companies' Act, 1862," who were being wound up, sued the defendant as a past member, who had been placed on the list of contributories, to recover from him the amount of certain calls which he was ordered by the English Court to pay to one of the official liquidators at a designated place.

Held, reversing the judgment of the Queen's Bench, (Galt, J., dissenting) that the liability of a past member to pay calls is a debt which originates at the time he becomes a holder of shares, and the plaintiffs could sue in an Ontario Court for the amount thereof.

C. Robinson, for the appellant.

Richards, for the respondent.

Appeal allowed.

From Q. B.]

MOORE v. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

Life insurance—Personal injury not communicated—Attendance by physician.

One M. obtained a policy of insurance on his life, issued and accepted on the conditions therein set out, one of which was, that the answers on the application which was made a part of the contract were warranted by the assured to be true in all respects, and that, if the policy had been obtained by any misrepresentation or concealment, it should be void. Among the questions and answers in the application were—7. Have you had any of the following diseases:—Dyspepsia? Answer, No. 8. Have you had any other illness, local disease, or personal injury; and if so, of what nature? How long since? What effect on general health? Answer, No. How long since you were attended by a physician? For what disease? Give name and residence of such physician. Answer, About thirty years ago. Lake fever. Dr. S., of, &c., now dead. Name and address of your usual medical attendant? Answer, Dr. B., who attended my family; has known me some years. Have you reviewed the answers to the above questions, and are you sure they are correct? Answer, Yes. At the end, was a declaration and warranty that the above were fair and true answers to the questions; and an agreement that if there should be in any of the answers any untrue or evasive statements, or any misrepresentations or concealment of facts, the policy should be void. The evidence showed that, about fourteen or fifteen years before, the deceased had been thrown out of a sleigh, and fallen on his head; that there was a depression and loss of part of his skull, which, the medical evidence showed, might have arisen from the fall, or from natural causes; that the fall had not affected his

general health; that his last illness had occurred soon after a blow upon his head received by striking against a bolt in his warehouse, close to the depression in his skull, that he was a reckless rider, getting frequent falls; that he occasionally suffered from indigestion, but never in a chronic form, and that during the last ten years he had been attended by three physicians besides Dr. B. above mentioned, but for trifling ailments only.

The jury, in answer to questions, found that the insured had not been afflicted with dyspepsia; that he had no personal injury which must have been present to his mind as something coming fairly within the term personal injury; that he had no serious or severe personal injury, which, through forgetfulness or inadvertence, he did not communicate, nor any personal injury which he might fairly be expected to communicate for the defendants' information, or which had any effect on his general health.

Held, (affirming the judgment of the Queen's Bench,) Burton, J. A., and Galt, J., dissenting, that the answer to the eighth question was a breach of the warranty, as the evidence clearly shewed that the injury arose from a fracture of the skull, which was produced by the fall from the sleigh, and that the assured was bound to mention an injury so severe and unusual, whether it affected his general health or not.

Per Burton, J. A.—That the personal injury in question was not within the warranty.

Per Galt, J.—That it was a matter of doubt upon the evidence whether the depression in the skull arose from natural causes or from the fall, and that it must be assumed from the answers of the jury to the questions put to them that they adopted the former view; and so there was no breach of the warranty.

Per Burton, J. A., and Galt, J.—That the answer to the fourteenth question was not a breach of the warranty, as the question was an ambiguous one, and may fairly have been interpreted by the assured as an enquiry as to the first occasion of his having to seek the service of a physician.

Per Galt, J., and Blake, V.C.—That if the Court below thought that the jury had decided contrary to the evidence, they should have ordered a new trial, but that they had no power to enter a verdict for the defendants.

Bethune, Q.C., for the appellant.

McMichael, Q.C., for the respondent.

Appeal dismissed.

Wilson v. Wilson.

Interpleader issue—New trial after payment over of money by Sheriff.

The execution creditor declining to admit the *bona fides* of a mortgage under which the property in question was claimed, an issue was directed by the Court of Chancery to be tried by the County Court. The parties agreed to try the case before the County Court Judge. At the trial, the good faith of the claimant was admitted, and the attack on the mortgage was confined to points of law. A formal verdict was entered for the claimant, which was afterwards set aside in Term. The execution creditor thereupon applied to the Referee for the usual order against an unsuccessful claimant, which was opposed by the claimant, on the ground that upon similar objections to a mortgage, the Court of Queen's Bench had lately decided in favour of its validity; but the Referee made the order as asked. An unsuccessful appeal against this order was made to a single Judge, whose decision was affirmed on re-hearing; but the Court, while affirming the order, gave the claimant leave to apply, within a month, for a new trial, which he did, when it was granted, but before the order for the new trial was made the Sheriff had paid over the money, which had been deposited in his hands to prevent a sale of the property, in accordance with the order of the Referee.

Upon appeal to the Court of Appeal, the order granting a new trial was reversed, on the ground that the Court of Chancery had no jurisdiction in the matter after the payment over of the money.

Donovan, for the appellant.

Fitzgerald, Q.C., and *O'Donohoe*, for the respondent.

Appeal allowed.

Lincoln Election Petition.

Counting votes—Admissions—Loss of papers.

1. *Held*, that admissions made by one of the parties during the counting of the ballots, where both parties were acting under an erroneous assumption as to the powers of the Registrar, are not binding.

2. *Held*, that votes may be properly counted for a candidate, where by taking into account the number of votes proved by inspection of documents to have been cast for each candidate, and the whole number cast, it is certain, as a mere matter of calculation that the votes in question must have been given for a particular candidate.

3. *Held*, that the statement of the voter cannot be received as evidence that he voted, or for whom he voted, either by proving statements so made, or by calling the voter as a witness.

4. *Held*, that where from loss of the papers and want or inadmissibility of other evidence, it cannot be ascertained if certain parties voted or how they voted, the petitioner is bound to establish affirmatively that the party claiming the seat was duly elected; if he fails in this, the respondent, who was duly returned as elected, may hold his seat.

Hodgins, Q.C., for the petitioner.
Bethune, Q.C., for the respondents.

QUEEN'S BENCH.

IN BANCO. MICH. TERM.
December 27, 1878.

Frank v. Beswick.

Partnership — Right to retire — Death of Partner—Dissolution of Partnership.

Plaintiff and two others entered into a partnership under certain articles of agreement, which provided that on the death of any one of the partners, the business was to be closed till stock was taken and the affairs of the firm settled, when there was to be a division of profits: that if any partner desired to withdraw after a year from the date of the articles, he should give the other two members the right of refusal of his share of the business, &c. There was a contemporaneous agreement as to what and how the plaintiff was to pay for his share of the business, and then there was one instrument providing for the purchase by the other two partners of plaintiff's interest on certain conditions, with the alternative proviso that if plaintiff desired to withdraw from the firm he should be repaid all moneys put by him into the partnership, two months' notice of purchase or sale to be given on either side.

One of the two other partners died within six months from the date of the articles of partnership, and plaintiff more than two months before the expiration of the year, gave notice of his desire to retire and get back his money.

Held, that the effect of the death in the partnership within the year, was to dissolve the firm, and that as plaintiff could only have obtained the benefit of the last in part recited agreement, in case the firm continued to exist until after the close of the year his right of action was defeated by the dissolution, and his only remedy was an account in the ordinary way.

Meredith, for plaintiff.
John Cameron, contra.

Haldan v. Beatty.

Interpleader—Common Law and Chancery writs—Jurisdiction—Estoppel—R. S. O. ch. 54, ss. 11, 12, 13.

After the issue of an interpleader summons founded on two writs of *fi. fa.*, issued respectively from this Court and the Court of Chancery, the writ from the former Court was set aside.

Held, that the Judge in Chambers had jurisdiction, notwithstanding, to continue the proceedings and make the interpleader act as to the latter writ.

But, quære, even if the want of jurisdiction had been clear, whether a party could avail himself of it after having agreed to the order, accepted the issue, defended it at the trial, and moved against the verdict, &c., &c.

Donovan for execution creditor.
Campbell for claimant.
F. Osler for Sheriff.

Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 42ND VICTORIÆ.

During this Term, the following gentlemen were called to the Bar; namely :—

HENRY PIGOTT SHEPPARD.
ISAAC CAMPBELL.
A. BRISTOL AYLSWORTH.
RICHARD DULMAGE.
HARRY THATCHER BECK.
MATTHEW WILSON.
WILLIAM HENRY FERGUSON.
WILLIAM E. HIGGINS.
JAMES CARRUTHERS HEGLER.
FREDERICK WILLIAM PATTERSON.
EUGENE LEWIS CHAMBERLAIN.
MAXFIELD SHEPPARD.
NEIL A. RAY.

And the following gentlemen were admitted as Students of the Law and Articled Clerks, namely :—

Graduates.

WILLIAM RIDDELL.
DAVID PHILIP CLAPP.
ADAM JOHNSTON.
GEORGE GORDON MILLS.
GEORGE WILLIAM BEYNON.
JOHN HENRY MAYNE CAMPBELL.
CHARLES MILLAR.
THOMAS ALFRED O'ROURKE.
EDWARD ROBERT CHAMBERLAIN PROCTOR.
CONRAD BITZER.
JOHN RUSSELL.
JOHN WILLIAM RUSSELL.

Matriculants.

W. J. TAYLOR.
HARRY THORPE CANNIFF.
THOMAS PARKER.
A. DOUGLAS PONTON.
ALBERT EDWARD DIXON.

And as an Articled Clerk—

EUDO SAUNDERS.

Junior Class.

J. L. MURPHY.
A. G. CLARKE.
W. B. DICKSON.
W. G. WALLACE.
T. K. PORTEOUS.
D. H. TENNENT.
M. S. MCCRANEY
J. TELFORD.
C. H. CLEMENTI.
W. HAWKE.
J. B. PATTERSON.
J. W. HANNA.
C. H. CLINE.
G. W. DANKS.
C. A. HESSON.
R. E. HARDING.
C. HENDERSON.
J. CAMPBELL.
J. G. CHEYNE.
F. E. BERTRAND.
T MOFFAT.
S O. RICHARDS.

Articled Clerks.

A F. GODFREY and
HUGH MCMILLAN, as of Easter Term.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

CLASSICS.

Xenophon, Anabasis, B. I.; Homer, Iliad, B. I.; Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1-300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek:

FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

Or GERMAN.

A Paper on Grammar. Musæus, Stumme Liebe. Schiller, Lied von der Glocke.

Candidates for Admission as Articled Clerk, except Graduates of Universities and Students at-Law), are required to pass a satisfactory Examination in the following subjects :—

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

After Hilary Term, 1879, the Matriculation Examination will be as follows:—

SUBJECTS OF EXAMINATION.

Junior Matriculation.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

Mathematics.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

English.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem:—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

History and Geography.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects.

French.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

German.

A Paper on Grammar.

Museeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer.
Die Kraniche des Ibycus.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

For Call.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

For Call, with Honours.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

For Certificate of Fitness.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

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QUEEN'S BENCH.

(Continued.)

Cross v. Currie & Brown.

Promissory note—Accommodation endorser—Innocent holder.

Defendant B. endorsed a promissory note made by defendant C. for the purpose of renewing a former note also endorsed by him for C.'s accommodation. C., instead of retiring the former note, parted with the renewal to plaintiff, a creditor of his, who was at the time aware that B. had been assisting C. in money matters. After the note had been endorsed by C. to plaintiff, C. procured B.'s endorsement of another note at a shorter date, stating that the holders of the original note would not accept the first renewal, and promising to return the latter with the original note. It was found that there was no bad faith on plaintiff's part in taking the note.

Held, that C. had B.'s authority to endorse the note to plaintiff, and that the only notice the law would impute to plaintiff taking the note from C., the maker, was that B. was a surety for him, and perhaps an endorser without value for his accommodation; and therefore,

Held, that plaintiff was entitled to recover against B.

J. A. Miller for plaintiff.

Bethune, Q.C., contra.

Gouinlock v. Manufacturers & Merchants' Mut. Fire Ins. Co. of Canada.

Insurance—Statutory conditions (Rev. Stat. O., cap.. 162.

To the question contained in an application for insurance, "For what purpose are the premises occupied," the answer was, "Dwelling, &c."

Held, that this meant, dwelling *et cetera*, and that the applicant thereby gave notice that the premises were otherwise occupied for another purpose also, which it appeared was as a drinking saloon. It also appeared that the Company's agent had the fullest knowledge of the saloon being there, and that its presence was in fact the subject of discussion between applicant and him, and it further appeared that the chief agent had certified on the back of the application that he had personally inspected the premises and recommended the risk.

Held, that there was no breach of the first statutory condition (R. S. O., ch. 162) and that plaintiff was entitled to recover.

Hardy, Q.C., for plaintiff.

F. Osler, contra.

Davidson v. House.

Insolvency—Fraudulent preference—Estoppel.

Insolvent, within thirty days before his insolvency, executed a mortgage to defendant for alleged money advances. A composition was agreed on, and, as collateral security therefor, defendant assigned the mortgage to the assignee. The composition was, apparently, not carried out, and plaintiff—the assignee—brought ejectment to recover the mortgaged premises, claiming both under the assignment, and that the mortgage was fraudulent as against creditors.

Held, that the mortgage was a fraudulent preference, and that the assignee was not precluded, by having taken the assignment,

from so regarding it; that at the most it could only be upheld for the purpose for which it was assigned, which purpose had not been fulfilled.

Parsons v. Standard Insurance Company.

Insurance—Prior insurance—Substitution.

Held, in an action on a policy of insurance, that an unintentional error on the part of the applicant for insurance in the name of one of the companies in which he was already insured, where the true amount of the insurance was given, did not vitiate the policy.

Held also, that the true amount already upon the property being given, the fact that one policy was allowed to drop or be cancelled, and another for a like amount to take its place in a different company, did not avoid the contract of insurance, because of the non-communication of the substituted policy to the insurers; but that the 8th statutory condition (R. S. O. ch. 162) had been substantially complied with, it being merely directed against the increase of the risk without the consent of the insurer.

McCarthy, Q.C., for plaintiff.

Bethune, Q.C., contra.

Regina v. Ray.

Criminal law—Conviction—Mandamus to enforce.

The Court refused to grant a mandamus compelling the mayor of a municipality to issue a warrant on a conviction made by him, where the conviction was open to grave objections.

Johnson, for the Crown.

Ferguson, Q.C., contra.

Marrin et al. v. Stadacona Insurance Company.

Fire Insurance—Loss, if any, payable to third party—Cancellation—Right of insured to recover.

Plaintiffs effected an insurance with defendants, "loss, if any, payable to H.," as security for goods supplied by H. to them. The policy was held by H., and the judge found on the trial that it was handed over, by some mistake of the latter's clerk, among a number of other policies, to defendants, for surrender and cancellation.

Held, that plaintiffs were entitled to recover, and that the action could not have been properly brought in the name of H., whose interest, if any, was wholly contingent on the state of his account with the plaintiffs when the right of action accrued.

Held also, that in the case of a policy such as this, the payee cannot deal with it as his own, and agree to its cancellation. He may surrender his claim under it, but the owner of the property, who is named as the insured, if he retain his interest in the property, is entitled to the insurance to the extent of such interest.

Ferguson, Q.C., and *O'Sullivan*, for plaintiffs.

Robinson, Q.C., and *O'Brien*, contra.

Regina v. Wilson.

Criminal information.

The Court, following recent English decisions, confirming the granting of permission to file a criminal information for libel to the case of persons occupying an official or judicial position, and filling some office, making it for the public interest necessary that such jurisdiction should be exercised for the regulation of the libellous charges made, refused leave to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to.

Robinson, Q.C., and *E. Martin*, Q.C., for applicant.

McCarthy, Q.C., and *Watson*, contra.

Regina v. Bannerman.

Criminal law—Forgery—32, 33 Vict., cap. 19, sec. 54—Corroborative testimony.

On an indictment for forgery of the prosecutor's name as indorser of a promissory note, the prosecutor swore that he had not endorsed the note, that it was not his writing, that he had never authorized the prisoner to sign his name to the note, and that

he was himself unable to write his name, being, in fact, a marksman; and a son of the prosecutor also swore that his father was unable to write his name, and was a marksman.

Held, Cameron, J., dissenting, that a sufficient *prima facie* case was thus made out, and that the prosecutor's evidence was duly corroborated within the meaning of 32, 33 Vict., cap. 19, sec. 54, and that the onus was then on the prisoner to show that he was authorized to use or write the prosecutor's name.

J. G. Scott, Q.C., for the Crown.

McDougall, contra.

Hughes v. Brooke.

Devise in trust—Refusal to accept—Non-joinder—Continuance of tenancy—Right of devisees in trust to recover rent.

One of the devisees in trust under a will from the first always refused to accept the trust.

Held, that he was not a necessary party plaintiff in an action for the rent of the premises devised, although his formal renunciation in writing was not made until after the rent in question had accrued due.

Defendant was tenant from year to year of the premises in respect of which the rent in question was sought to be recovered, being for three quarters accruing due after the death of the lessor. No notice to quit was given, nor was the tenancy determined by the consent of the parties entitled; on the contrary, defendant recognized the continuance of the tenancy by the payment of rent falling due after the lessor's death.

Held, that the tenancy was not determined by the death of the lessor, and that plaintiffs, the devisees in trust under the lessor's will, were entitled to recover the three quarters in use and occupation.

Held also, that it was no answer for the defendant that he ceased to occupy, for he still held, and might have occupied had he chosen so to do.

Read, Q.C., for plaintiff.

McMichael, Q.C., contra.

Leslie et al. v. Canada Central Railway Company.

Railways and Railway Companies—Wrongful delivery of goods—Trover.

The plaintiffs, nurserymen in Toronto, sent by the Grand Trunk Railway Company fourteen packages of trees, addressed to their own order, to Cobden, a station on defendants' line of railway, receiving the usual shipping note issued by the Grand Trunk Railway Company. The goods were delivered by that company to defendants in the ordinary course, and carried to Cobden. They were intended for one S. there, who had agreed to purchase them from the plaintiffs, but the plaintiffs required payment from him before delivery. Several telegrams passed between S., the station-master, and the plaintiffs, and the station-master, being authorized by the plaintiffs to deliver only half of the packages to S., allowed him to take all, receiving from him the entire freight from Toronto.

Held, that the defendants were liable in trover for the packages thus wrongfully delivered, and that it made no difference that the contract to carry was with the Grand Trunk Railway Company only.

Reeve, for the plaintiffs.

McCarthy, Q.C., contra.

COMMON PLEAS.

IN BANCO. MICH. TERM. December 27, 1878.

Regina v. Herod.

Criminal law—Evidence—Admissibility of.

On the trial of the prisoner on an indictment for murder, it appeared that the death of the deceased was caused by his being stabbed by a sharp instrument, and that the stabbing took place on the street on a very dark night, with a number of persons about, some hostile and others friendly to the prisoner. Two witnesses swore that they saw prisoner strike the deceased, one stating that he witnessed one, and the other two blows, but no knife or other instrument was seen in his hand. The prisoner's counsel

proposed to shew that the prisoner, on the day preceding the homicide, had a knife, which, according to the medical testimony, was not calculated to inflict the wound which caused the death of the deceased. The learned Judge, at the trial, refused to admit this evidence.

Held, Galt, J., dissenting, that the evidence was properly rejected.

J. Crerar, for the Crown.

McMichael, Q.C., for the prisoner.

PERKINS v. BECKETT.

Promissory note—Action on by insolvent—Non-intervention of assignee—Recovery.

To an action by the endorsee against the maker of a promissory note, it is no answer, where the assignee in insolvency does not intervene, that the defendant is an uncertificated bankrupt.

Robinson, Q.C., for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

GIRALDI v. THE PROVINCIAL INSURANCE COMPANY.

Act relating to—Statutory conditions—Construction of—Non payment of premium—Effect of.

One of the conditions of a policy provided that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium. The defendant set this up and averred non-payment.

Held, that even although this could not be set up as a condition, not being one of the statutory conditions or a variation thereof, it might still be relied upon as an agreement of the parties which went to the foundation of the contract, and denied that the insurance ever came into existence.

Held, per GWYNNE, J., dissenting from *Ulrich v. National Insurance Company*, 42 U. C. R. 141, and *Frey v. Mutual Insurance Company of Wellington*, 43 U. C. R. 102, that the proper construction of "The Fire Insurance Policy Act" was, that the statutory conditions are to be regarded and adjudged as part of every policy, whether without conditions at all or not, in accordance with the statute.

J. K. Kerr, Q.C., and *Smythe* (Kingston), for the plaintiff.

Robinson, Q.C., for the defendants.

BENEDICT v. KERR.

Storage of grain—Fire—Recovery.

The plaintiff, a farmer, stored some barley with the defendant, a grain dealer, and received a receipt from the defendant acknowledging that he received from the plaintiff in store 552 bushels of barley. The plaintiff intended to sell to the defendant, but as the market price was low, it was left with the defendant in store, and mixed with other large quantities, and dealt with by defendant as his own, the plaintiff being at liberty at any time to accept the market price, or to call upon defendant to return him an equal quantity, though not the identical grain. No price was ever agreed upon, nor the barley returned. The defendant's store was subsequently destroyed by fire, and a large quantity of grain destroyed. The defendant having refused to pay for the barley or return a similar quantity, the plaintiff brought an action against the defendant to recover the amount of the same.

Held, that plaintiff was entitled to recover.

McMichael, Q.C., and *Smythe*, for the plaintiff.

Hardy, Q.C., for the defendant.

MURPHY v. YEOMANS.

Partnership—Sale after dissolution—Validity

G. D. and A. D., who were in partnership as bakers, purchased some wheat for their business, but which was not used by them, not being of the required quality. On January 28th, 1876, the partnership was dissolved by an instrument under seal, G. D. giving A. D. $165 in cash, and a note for $500, retaining the assets and continuing the business. On March 14th, G. D., on the ground of his being a minor and not bound by the dissolution, filed a bill in Chancery by his next friend, for a partnership account. On the 16th of March, G. D. sold the wheat for value to the plaintiff, who was aware of its being partnership property

but was not aware of the Chancery proceedings.

Held, that the sale was valid, for that notwithstanding that the sale took place after the dissolution, it was so made, as the evidence shewed, by G. D., the continuing trader, in the legitimate exercise of his right of disposal of the partnership assets to meet existing demands against the partnership, and for converting the assets into money in the interest of the partners.

Drew, Q.C., for the plaintiff.

Guthrie, Q.C., for the defendant.

Waffles v. Ball.

Assessment and taxes—Advertisement—Taxes in arrears for three years—32 Vict., cap. 36, secs. 18, 128, 155, O.

Held, that, under sec. 155 of 32 Vict., cap. 36, O., the insufficiency of the advertisement of a tax sale cannot be set up when the two years have elapsed after the execution of the tax deed without the sale being questioned.

On the 18th of July, 1873, a warrant was issued, and on the 18th of December following the land in question was sold for the taxes imposed in 1870, and in arrear for that year.

Held, that the sale was valid, for that under sec. 128, in conjunction with sec. 18 of the Act, the taxes must be deemed to have been due for and in the third year when the warrant issued.

McCarthy, Q.C., for the plaintiff.

Lount, Q.C., for the defendant.

Brogden v. Manufacturers' and Merchants' Mutual Fire Insurance Company.

Insurance—Title—Incumbrances—Pleading—Building—Ownership.

In an action on a policy of insurance on a frame building, it appeared that the plaintiff purchased certain land from an infant for $60, which he was to pay, and get a deed therefor, in three years, when the infant would come of age. The plaintiff erected on the land, on cedar posts, the frame building in question.

In the application the plaintiff stated, in answer to the questions as to title and incumbrances, that he was owner, and that the property was incumbered to $60. By a clause in the application the insured was stated to covenant the truth of the statements in the application, so far as known to him and material to the risk, and that the application was to form part of and be a condition of the policy, but there was no condition in the policy itself making the application part of the policy.

Held, that a plea setting up that by one of the conditions of the policy the application was to be part of the policy, and averring misrepresentation as to the ownership of the property, failed to raise the defence attempted to be set up.

Held, however, that the answer was correct as to the building, for that the defendant was the owner of the building, and if the minor, on his coming of age, had refused to carry out the agreement, the plaintiff could have removed it.

Guthrie, Q.C., for the plaintiff.

J. H. Ferguson, for the defendants.

Coulson v. O'Connell.

Costs—Title to land—Certificate.

To an action against the defendant for negligently setting out fire on his land, which spread to the plaintiff's land and damaged his woods, the defendant, amongst other pleas, pleaded that the land and property were not the plaintiff's. There was a verdict for the plaintiff, with $50 damages, but no certificate for costs.

Held, following *Humberston* v. *Henderson*, 3 P. R. 40, that the plea raised the question of title to land, and that the plaintiff was, therefore, entitled to full costs without a certificate.

Lount, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

McKenzie v. Montreal and Ottawa Junction Railway Company.

Debentures—Coupons—Assignee—Right to recover.

By sec. 13 of 34 Vict., cap. 47, D., the defendants' Act of incorporation, the defendants were empowered to issue bonds or debentures in such form and amount, and payable at such times and places, as the direc-

tors might from time to time appoint, &c.; and by 35 Vict., cap. 12, sec. 2, O., the bonds or debentures of corporations made payable to bearer, or any person named therein as bearer, may be transmitted by delivery, and such transfer shall vest the property thereof in the holder thereof, to enable him to maintain an action in his own name.

The defendants issued bonds or debentures payable to bearer, and delivered them to C. & Co., the contractors for the building of the road, with coupons attached, for the payment of the interest half yearly. The coupons for the first instalment of interest were not paid.

The plaintiff brought an action on the coupons, alleging an assignment thereof to him, and that he was the lawful holder thereof.

Held, that the plaintiff held the coupons freed from any equities arising between the defendants and C. & Co., and that he was, therefore, entitled to recover thereon.

McMichael, Q.C., for the plaintiff.

J. K. Kerr, Q.C., for the defendants.

Inglis v. Wellington Hotel Company.

Stock—Agreement to pay for work to be performed—Validity of—Interest—C. L. P. Act, sec. 267, sub-sec. 2.

Held, that it is not *ultra vires* of a joint stock company to agree to pay a person for work to be performed for the company, in shares of the capital stock of the company, and the acceptance of such shares in payment of the work so performed will not create a liability as against creditors for the amount of such shares.

Held, that plaintiff, having performed certain work under such an agreement, could not sue upon an implied assumpsit to recover the value of the work in money, unless it be shewn that the defendants had refused to give the shares.

Under sec. 267, sub-sec. 2 of the C. L. P. Act, when a claim is payable otherwise than by a written contract, interest may be allowed from the date of a demand therefor in writing.

In this case no such demand was made, and a claim for interest was therefore refused.

McCarthy, Q.C., for the plaintiff.

Guthrie, Q.C., for the defendants.

Sanderson v. Dickson.

Insolvency—Discharge—Supplementary list of creditors.

To an action of covenant in a mortgage, a discharge in insolvency was set up as a bar, but it appeared that the plaintiff's name and debt were not mentioned or set forth in the sworn statement of the insolvent's affairs exhibited at the first meeting of the creditors, but it was urged that a list, which contained a reference to the mortgage, and from which the sworn statement was made up, could be looked upon as the supplementary statement provided for by the Act.

Held, that it could not have such effect, and more especially so as it appeared that the plaintiff's name and debt had been intionally left out of the sworn statement.

The discharge was, therefore, held not to operate as a bar to the plaintiff's claim.

J. K. Kerr, Q.C., for the plaintiff.

Hector Cameron, Q.C., for the defendant.

Wilson v. Standard Insurance Company.

Insurance—Buildings within 100 feet—Warranty.

To an action on a fire insurance policy on a stock of goods, the defendants pleaded, setting up one of the conditions of the policy, that the application, survey, and diagram should be taken as part of the policy, and that an erroneous or untrue representation or statement in such application, &c., or omission to make known any fact material to the risk of the policy, should be null and void, and averred that there was a breach of warranty alleged to have been made by the applicant, that there were no buildings or premises within one hundred feet of that within which the insured property was situated other than those mentioned in the application, survey, and diagram, whereas there were other buildings, describing them.

Held, that there was no such warranty as was alleged, for that it appeared from the

application that the only warranty was as to the answers to the questions submitted, none of which referred to the existence of buildings within one hundred feet, and that the applicant was only required to make known such buildings as were material to he risk, and it was proved that the buildngs omitted were not of such a character.

Hardy, Q.C., for the plaintiff.

Bethune, Q.C., for the defendants.

Trotter v. Corporation of Toronto.

Water Commissioners of Toronto—Neglect of—Action against City—Limitation of action—Notice of action—35 V. c. 79, O.

This was an action against the City of Toronto for the non-repair of certain main pipes laid down in one of the streets for waterworks purposes, whereby the plaintiff's premises were injured. The pleadings are fully set out in the previous report of the case on demurrer : 28 C. P. 574.

Held, that the plaintiff could not recover, for that the claim was barred by reason of the action not having been brought within a year after the original cause of action arose, as required by 35 Vict., cap. 79, sec. 35, O. ; and also on the ground that the defendants were entitled to notice of action.

Bethune, Q.C., and *A. C. Galt*, for the plaintiff.

Biggar, for the defendant.

Fortier v. Royal Canadian Insurance Company.

Agreement—Correspondence—Surrounding circumstances.

By means of a correspondence which took place between plaintiff and defendants, commencing on the 27th of November, 1873, and ending on the 22nd of the month of December following, an agreement was concluded for the appointment of the plaintiff as the marine manager of the defendants' company.

Held, that upon the evidence as disclosed by the correspondence and surrounding circumstances, the duration of the contract was to be three years, to commence from the 1st of January, 1874, and not from the first of the previous month—namely, 1st of December, 1873, by reason, as was contended by plaintiff, of the defendants having paid plaintiff for services performed by him during that period, an amount proportionate to the amount of the salary agreed on.

Ferguson, Q.C., for the plaintiff.

Robinson, Q.C., and *J. Stewart Tupper* for the defendants.

Rooney v. Rooney.

Trinity Term—Sitting of Court in, dispensed with—Motion for rules nisi—When to be made—Power of Court.

Held, that notwithstanding the Court have by rule thereof dispensed with the sittings of the Court during Trinity Term, it is still a Term of the Court, and motions for rules nisi for new trials, &c., must be made during the first four days thereof.

Held also, that notwithstanding R. S. O., ch. 49, sec. 284, the Court have the power to entertain such motions after the expiration of the four days.

CHANCERY.

Blake, V.C.] [Dec. 20, 1878.

Barters v. Howland.

Patents — Prior disclosure — Similarity of claims—Evidence—General denial of invention—Pleading.

When the plaintiff had, more than one year previous to his application for a patent in Canada, obtained a patent in the United States substantially disclosing the same invention, though not containing all the claims contained in the Canadian patent :

Held, under section 7, Patent Act, 1872, that such foreign patent amounted to a publication of the whole invention in Canada, and imported a disclaimer of all parts not claimed in the foreign patent ; and that the Canadian patent for the parts so published and disclaimed was invalid, although such foreign patent was not technically a patent for the same invention.

Held also, that a patent in Canada granted to an independent inventor, after the plaintiff's foreign patent, but before his application for a patent in Canada, was valid against the plaintiff's subsequent patent.

Held also, that evidence of such prior Canadian patent to an independent inventor was admissible under a general denial that the plaintiff was the first inventor.

Blake, V. C.] [Jan. 4.

Dilk v. Douglas.

Mortgages—Fraudulent transaction.

C. created two mortgages in favour of M. B. and her two sisters to secure repayment of moneys advanced by them. C. subsequently sold the lands comprised in these mortgages to different parties, and after the death of the two sisters, procured M. B. alone to execute discharges of these mortgages, conveying to her other lands by way of security, which, however, were wholly insufficient in amount. After the the death of M. B. the personal representative of herself and her sisters filed a bill, seeking to charge the lands embraced in the original mortgages, with the amount remaining due on these securities, and the Court, under the circumstances, made a decree for payment of shares which should have been coming to the two sisters, with costs.

Proudfoot, V.C.] [Jan. 6.

Attorney-General v. O'Rielly.

Escheat—Jurisdiction—Demurrer.

Held, on demurrer (1), that the doctrine of escheats applies to lands held in Ontario; (2), that the Attorney-General of Ontario is the proper party to represent the Crown, and to appropriate the escheat to the uses of the Province; (3), that this Court has jurisdiction in such cases; and (4), that it was proper for the Attorney-General, if he saw fit, to file a bill in this Court to enforce the escheat.

Proudfoot, V.C.] [Jan. 6.

Rees v. Fraser.

Legacy to infant—Loco parentis—Residue—Next of kin—Maintenance.

A testator bequeathed $4,000 to his grandson, payable on his attaining 21, and in case of his death before that period, the amount was to revert to the residuary estate, and it had been decided (25 Chan. R. 253) that in the events that had happened the grandson was absolutely entitled to one-half of the residuary estate, the income of which was amply sufficient for his maintenance.

Held, that although the testator had been *in loco parentis* to the infant, the infant was not entitled to claim interest on the legacy for his maintenance; but that being entitled to one-half of the residue as next of kin, and there being a *quasi* intestacy as to the interest on the legacy, one-half of it should be paid into Court to the credit of the infant; the legacy itself to be paid into Court upon the trusts of the will.

Proudfoot, V.C.] [Jan. 6.

Emerson v. Canniffe.

Executors—Contribution—Lapse of time.

After the distribution of the personal estate, and the allotment to the devisees of the real estate of a testator, an action was brought against the executors on a covenant of the testator, in which a judgment was recovered, the amount of which the executors paid out of their own money. Twenty-seven years afterwards, and after the greater number of the devisees had died, and all but one had sold their property to *bonâ fide* purchasers without notice, the executors instituted proceedings in this Court against the heirs of that one, to compel them to recoup the executors. The Court, under the circumstances, refused to make a decree for more than a proportionate share of the demand, leaving the executors to litigate the question with the parties liable to contribute to the payment of the debt, as owing to their delay in suing, the obstacles in the way of the defendants recovering were quite as great as they were to the plaintiffs enforcing the claim.

Proudfoot, V. C.] [Jan. 6.

Johnson v. School Trustees.

Public School Trustees—Selection of School site—Tenant of lands selected.

In proceeding to select a site for a public school-house, no notice was given to a lessee

in possession of the property selected, of the proceeding to arbitrate upon the question of compensation, and in consequence he did not name an arbitrator, neither did he attend before or take any notice of the arbitration; and the arbitrators in fact did not take into consideration the value of his interest, or find that such interest was not of any value. The Court, at the instance of the lessee, declared that his interest had not been affected by the arbitration, and directed an inquiry as to damages sustained by him, and ordered the trustees to pay him his costs of suit.

COUNTY COURT OF THE COUNTY OF WENTWORTH.

(*Reported by* John F. Monck, *Esq., Barrister-at-Law.*)

Re Creen.

Insolvency—Setting aside attachment—Affidavit heading of, merely descriptive.

Upon an application to set aside a writ of attachment in insolvency, on the ground that it was issued on insufficient material, it appeared that the affidavit on which the order for the attachment was granted, made no reference to the debtor's occupation or business, except that it described him in the style of cause as a merchant, and afterwards stated that the deponent believed the debtor was insolvent within the meaning of the Insolvent Act of 1875.

Held, that the heading of an affidavit is merely descriptive, and not an allegation of fact.

Held, that the affidavit in question was defective in not stating facts sufficient to satisfy the Judge who granted the order that the debtor was a trader within the meaning of the Act.

[Hamilton, Nov. 28, 1878.

This was an application by John Creen to set aside a Writ of Attachment in Insolvency, issued against him, on the ground that the material on which the order was granted was insufficient, and also on the merits, the petition being presented within five days after the issue of the attachment.

The following is the affidavit on which the attachment was obtained :—

"Insolvent Act of 1875, and amending Acts.

Canada: Province of Ontario, County of Wentworth. } The Merchants' Bank of Canada, Plaintiffs, *vs.* John Creen, of the Village of Waterdown, in the County of Wentworth, Merchant, Defendant.

I, Edward Field Hebden, of the Town of Mitchell, in the County of Perth, Esquire, being duly sworn, depose and say—

1. I am the agent of the plaintiffs in this cause, duly authorized for the purposes hereof, and have full knowledge of the matters hereinafter deposed to.

2. The defendant is indebted to the plaintiffs in the sum of three thousand two hundred and forty nine (44-100) dollars currency, for the amount of a judgment recovered against him in the Court of Queen's Bench, and for which the plaintiffs hold no security.

3. To the best of my knowledge and belief, the defendant is insolvent within the meaning of the Insolvent Act of 1875, and amending Acts, and has rendered himself liable to have his estate placed in liquidation under the said Act, and my reasons for so believing are as follows :—The said defendant has permitted an execution issued against him, under which his lands and tenements have been seized and taken in execution, to remain unsatisfied for fifteen days after such seizure, and the Sheriff of the County of Wentworth has advertised defendant's lands for sale under a prior execution, and has stated that he must return the execution against goods *nulla bona*.

4. I do not, nor do the plaintiffs, act in this matter in collusion with the defendant, nor to procure him any undue advantages against his creditors.

5. The defendant resides at Waterdown, in the County of Wentworth, and I have signed.

Sworn, &c."

Laidlaw, for the petitioner.

W. Bell, for the Attaching creditors.

Sinclair, Co. J.—It is urged that the affidavit does not show that Creen was at the time of issuing the attachment "a trader" within the meaning of the Insol-

vent Act, or that the debt had been contracted while he was a trader.

This objection is open to him under the amending Statute of 39 Vict. cap. 30, sec. 3, as a "substantial insufficiency in the affidavits," and probably is so independently of that Statute*Mc.*" *Donald* v. *Cleland*, 6 Prac. R., at page 290.

Under the Act of 1875, of course, no person can be placed in insolvency unless he is a trader within the meaning of that Statute and the amending Acts. It is admitted by counsel for the attaching creditors that the word "merchant," in the style of the cause or proceeding, is not a fact deposed to in the affidavit, and I imagine the concontrary could not be contended for with any show of reason. It is contended, however, that it is a description of the insolvent's business, and coupled with the statement in the third paragraph of Mr. Hebden's affidavit, that the person described as "merchant" is insolvent within the meaning of the Acts, shows sufficient to warrant the issue of the attachment. It appears to me that the word "merchant," as used in this affidavit, is merely descriptive. It forms no part of the facts deposed to. In *Hood* v. *Cronkite*, 4 Prac. R. 279, Draper, C. J., said, "the statement of addition as to the name of the deponent is merely descriptive. It is not an allegation of fact." I also refer to *Rogers* v. *Crookshank*, 4 U. C. L. J., O. S., 45. It was mentioned, though not decided, in *McDonald* v. *Cleland*, that the omission of the place of residence, and addition of the parties, did not invalidate an affidavit for attachment in insolvency. In the third paragraph of the form of affidavit appended to the Act of 1875, appear the words, "state concisely the facts relied upon as rendering the debtor insolvent, and as subjecting his estate to be placed in liquidation."

Is it a fact necessary to be shown that the insolvent is a trader within the meaning of the insolvent laws? Undoubtedly it is so, under the first section of the Act of 1875.

It gives a statutory description of those who are traders under that Act. No doubt a merchant is one who uses "the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or retail," within the meaning of the first section, but the fact that he carries on such business should be distinctly stated. What should be shown by the affidavit is such fact or facts as should reasonably convince the Judge to whom application is made for the order, that the debtor is an insolvent within the meaning of the Act. On the facts being shown, it is for the Judge to draw his conclusions of law, and I do not think a man's estate should be placed in liquidation, unless the affidavit discloses facts clearly establishing insolvency: *Bateman* v. *Dunn*, 5 Bing. N. C. 49.

This affidavit does not state that Creen is a merchant, from which I might deduce that he was a "trader," nor does it affirm, even in general terms, that he is "a trader" (which latter I think insufficient), but I am asked to say, because the person who drew the affidavit describes the debtor in the style of cause as a "merchant," that I should from that be satisfied he is so. The deponent is studiously made to avoid swearing even to that fact, yet I am asked to presume that that existed which is not sworn to. At page 872 of the third edition of Lush's Practice, it is laid down that to render an affidavit admissible, it must have been made by a person competent in point of law to give testimony, and before a person of competent authority to administer an oath, and its statement must be clear and unambiguous, and nothing left to implication, so that perjury may be assigned thereon if false. See *Classey* v. *Drayton*, 6 M. & W. 17. If perjury could not be assigned on the affidavit, it is defective: *Watson* v. *Walker*, 1 M. & W. 437.

What fact is sworn to in this affidavit showing Creen to be a trader? None whatever, and the case of *Hood* v. *Cronkite*, already cited, is authority for showing how the style of cause at the heading should be viewed. In matters of such serious consequence to debtors, involving, even if an attachment be improperly issued and afterwards set aside, perhaps the total destruction of a man's business and credit, it is all important to see that every necessary fact

is shown to authorize an attachment before a Judge should grant the order. In this case I do not think the affidavit on which the order was granted disclosed such facts, and I must set aside the order and attachment with costs. It is not necessary to consider the merits. I think the official assignee should, if necessary, be protected

Order accordingly.

RECENT ORDERS OF THE COURT OF CHANCERY.

January 10, 1879.

638. Any adult person entitled to apply under Orders 467 or 471 for an administration order may apply to the Master in the county town of the County (other than the County of York) where the deceased person, whose estate it is desired to administer, resided at the time of his death; and such Master may, on fourteen days' notice being given to the person or persons entitled under the present practice to notice of such an application, make an order for the administration of, and proceed to administer, such estate in the least expensive and most expeditious manner.

639. Such Master shall have full power to deal with both the realty and personalty of the estate the subject of administration and shall dispose of the costs of the proceedings, and shall finally wind up all matters connected with such estate, without any further directions, and without any separate, interim, or interlocutory reports or orders, except where the special circumstances of the case absolutely call therefor; and in so doing he shall be guided by the practice heretofore had in the administration of estates upon an application made in Chambers for an administration order: Provided always, that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise without an order of the Judge in Chambers or the Court; and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper.

640. Any adult person who has heretofore been entitled to a decree or order for the partition of an estate may, on serving one or more of the persons entitled to a share of the estate of which partition is sought, with a fourteen days' notice of motion, apply to the presiding Judge in Chambers, or to the Master in the County (other than the County of York) wherein the land sought to be affected by the proceeding lies, for an order for the partition or sale of the premises in question; whereupon such Judge or Master may make such order for partition or sale, or such other order as may be proper; and the Master shall thereupon proceed in the least expensive and most expeditious manner, according to the practice now in force, for the partition or sale of the premises, the ascertainment of the rights of the various persons interested the adding parties, the taxation and payment of costs, and otherwise: Provided always, that where an infant is interested in the estate no order shall be made for partition or sale until such infant is represented by its guardian *ad litem*; and provided also, that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise without an order of the Judge in Chambers or the Court; and on application for such order the Judge may review, amend. or refer back to the Master his report or order, or make such other order as he deems proper.

641. When after an order has been made under Order 640 lands are discovered in another county, an application may be made to a Judge in Chambers for the partition or sale of such lands under the order formerly made, and where two or more orders have been made by masters in different counties an application may be made in Chambers for an order as to the conduct of the future proceedings.

642. There shall be an appeal to the presiding Judge in Chambers—on any day that he may sit in Chambers—against any decree, order, report, ruling, or other determination of any Master; the notice of such appeal shall be a seven days' notice, and shall set out the grounds of objection, and the

appeal shall be set down for argument not later than the Saturday preceding the day on which it is to be argued, and shall be brought on for argument within a month—not including vacation—of the making of such decree, order, report, ruling, or determination, or within such further time as a Judge may think proper, and the presiding Judge may then hear, or adjourn into Court, or otherwise dispose of such matters on such terms as he thinks proper.

643. In all suits hereafter instituted for administration, or partition, or administration and partition, unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff now in force, each person properly represented by a solicitor, and entitled to costs out of the estate—other than creditors not parties to the suit—shall be entitled to his actual disbursements in the suit, not including counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate a commission on the amount realized or on the value of the property partitioned in the suit, which commission shall be apportioned amongst the persons entitled to costs as the Judge or Master thinks proper. Such commission shall be as follows :—

On sums not exceeding $500	20 per cent
For every additional $100 up to $1,500	5 "
For every additional $100 up to $4,000	3 "
For every additional $1,000 up to $10,000	2½ "
For every additional $1,000	1 "

and such remuneration shall be in lieu of all fees whether between "party and party," "as between solicitor and client," or "between solicitor and client."

644. When two or more suits are instituted for administration, or partition, or sale, the judge may, in his discretion, disallow all, or any, of the costs of any suit or suits which, in his opinion, has or have been unnecessarily prosecuted.

645. Order 434 shall apply to cases in which an adult is interested in the estate as well as an infant, and also to suits for redemption.

646. Order 435 shall apply to redemption suits; and under Orders 434 and 435 there may be granted, where it is prayed for and notice is given in pursuance of Order 647, a decree embracing the additional relief which this Court is entitled, under "The Administration of Justice Act," to give, in mortgage cases, on the hearing of the cause *pro confesso*, and such a decree may be granted, notwithstanding that the defendant has been served by publication, or otherwise, or is a corporation; provided always that where the bill has not been personally served the claim of the plaintiff shall be duly verified by affidavit.

647. In suit for foreclosure or sale, where the plaintiff prays for an order for the immediate delivery of possession, or for an order for immediate payment against a defendant, he must, in addition to the notice required by Schedule S, endorse upon the office copy of the bill served upon the defendant for further notice :—

(Where order for immediate possession prayed :)

"And the plaintiff will be entitled to an order for the immediate delivery of possession of the mortgaged premises to him."

(Where order for immediate payment prayed :)

"And the plaintiff will be entitled forthwith to execution against the goods and lands of you (naming the defendant against whom the plaintiff is entitled to this relief) to recover payment of the amount due by you."

648. Every Deputy-Registrar shall have the same power, as to the issue of decrees on *recipe*, as by Order 646 and the Consolidated General Orders is given to the Registrar of the Court.

649. Every decree or order hereafter made by this Court, whether the service of the bill, or other proceedings on the defendant, has been personal by publication or otherwise, shall be absolute in the first instance, unless the Court shall otherwise order.

650. The Local Masters and Deputy-Registrars shall enter in a book or books, kept for that purpose, all decrees or orders made by them ; and they shall, on the conclusion of every suit or matter annex together all the pleadings and papers, filed with them in such suits or matter, and transmit the same to the Clerk of Records and Writs, who shall duly enter and file the same.

651. All orders and portions of orders inconsistent with these orders are hereby abrogated.

J. G. Spragge, C.
S. H. Blake, V. C.
Wm. Proudfoot, V.C.

Law Society of Upper Canada.

OSGOODE HALL,

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

CLASSICS.

Xenophon, Anabasis, B. I.; Homer, Iliad, B. I.; Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1-300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek:

FRENCH.

A Paper on Grammar. Translation of Simple sentences into French Prose. Corneille, Horace, Acts I. and II.

Or GERMAN.

A Paper on Grammar. Musaeus, Stumme Liebe. Schiller, Lied von der Glocke.

Candidates for Admission as Articled Clerk. except Graduates of Universities and Studentes at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

After Hilary Term, 1879, the Matriculation Examination will be as follows:—

SUBJECTS OF EXAMINATION.

Junior Matriculation.

CLASSICS.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. I.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1–300.
Virgil, Æneid, B. I., vv. 1–304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

A Paper on Grammar.

GERMAN.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

DIARY FOR FEBRUARY.

2. Sun....4th Sunday after Epiphany.
3. Mon....Hilary Term begins. Convocation meets.
4. Tues ..Convocation meets.
6. Thur...Hagarty, C. J., sworn in as C. J. of C. P., 1856.
8. Sat ...Convocation meets.
9. Sun....Septuagesima.
10. Mon ...Queen Victoria married, 1840.
11. Tues...Hon. R. E. Caron, Lieut.-Governor of Quebec, 1873.
14. Fri....Convocation meets.
15. Sat ...Hilary Term ends.
16. Sun. ..Sexagesima.
17. Mon. ..Last day to move against Municipal Elections.
18. Tues ..Canada settled by the French, 1534.
20. Thur ..Rehearing Term in Chancery begins.
23. Sun. ..Quinquagesima.
26. Wed...Ash Wednesday.
27. Thur..Sir John Colborne, Administrator, 1838.

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Canada Law Journal.

Toronto, February, 1879.

We direct attention to a number of cases decided in Chancery Chambers published in this issue. They have been prepared expressly for this journal and will be of interest to many of our readers. We shall continue to give our readers from time to time early reports of such cases as are of importance to practitioners, both in Common Law and Chancery Chambers.

In *Wheelhouse* v. *Darch*, 28 C. P. 269, the Court affirmed the law to be that, by twenty years' user, a right of lateral support for the wall of a house will be presumed as against the adjacent owner. In a contemporaneous decision in England, *Angus* v. *Dalton*, L. R. 3 Q. B. D. 85, the majority of the Court held this presumption to be rebuttable, and that if it appears that no grant were made, or if this can be implied from the circumstances, the presumption fails. This case was carried to appeal, and the Lords Justices have, by a majority, reversed the decision. The effect of this case in appeal is to establish the law that a grant of support to buildings by adjacent lands is presumed from undisturbed user for twenty years, and the fact that there was no grant will not displace this presumption.

Apropos of the discussion in our columns not long since, as to the advisability of publishing the dissenting opinions in Appellate Courts, we find the following observations in the *Solicitors' Journal* of December 14th, 1878:—

"We have never hesitated to say that we think the rule adopted by the Privy Council of not promulgating dissentient

opinions is a good one in the case of a Court of final appeal. We venture to think, with Lord Selborne, that in the case of a court from which there is no further appeal, the judgment should always be an authoritative one, free from the expression of individual opinions calculated to detract from its weight. A final tribunal which gives forth an uncertain sound is a very unsatisfactory institution. Moreover, the fact that but one judgment can be delivered is likely to exercise a beneficial influence on the care with which the judgment is prepared. It may be that the minority of the judges will devote more pains to finding out and laying bare the weak points in the draft judgment of the majority than they would if they were at liberty publicly to state the view which occurred to them, and it seems certain that the majority will be more anxious to appreciate and give effect to the opinions of the minority than if the latter had the opportunity of stating these opinions for themselves." These are wise and weighty words, and are singularly applicable to some of the deliverances of the Supreme Court at Ottawa, where unity has been lost sight of in the desire to emphasise points of judicial divergence.

On the 14th January last, Secker Brough, Esq., formerly Judge of the County Court of Huron, died at his residence, in Goderich.

Mr. Brough was born in Ireland in 1813. He was educated at Trinity College, Dublin. Shortly after he emigrated to Halifax to join his uncle General Brough, R.A., then commandant at that place. He came afterwards to Toronto, where he entered the office of Messrs. Hagerman & Draper, then practising in partnership. He was called to the bar in 1840, and shortly afterwards became partner of Mr. Draper, with whom he continued to practise until the elevation of that gentleman to the Bench.

During this period Mr. Brough was engaged in many of the leading cases of the day, and was employed in several confidential matters by the Government.

Upon the establishment of the Court of Probate for Upper Canada, he was appointed Judge, and continued to hold the office until the abolition of the Court and the distribution of its functions among the various County Surrogate Courts. Mr. Brough for several years had one of the most extensive practices at the Chancery Bar, and took a very active and prominent part as a bencher of the Law Society. In 1859 he was appointed Queen's Counsel. In November, 1866, he was appointed Judge of the County Court of the County of Huron by Sir John A. Macdonald. Infirmity of health obliged him to abandon that position in the summer of 1877.

A meeting of the bar and county officials of the County of Huron was held after his death, and resolutions were passed expressive of regret at his loss and of sympathy with his family.

THE SUPREME COURT BENCH.

The retirement of Sir Wm. B. Richards from the distinguished position of Chief Justice of the Supreme Court has caused no surprise. He has well earned repose, even were his health better than it is. This Court can ill afford to lose the one of its Judges who, most of all, gave the public confidence in its future at its first organization. We have recently spoken at length of this learned Judge; but we cannot chronicle his retirement without expressing great regret that it must be so. His broad sagacious mind, cool clear head, intimate knowledge of

the business of the country, and the instincts of the people, combined with his large legal attainments eminently fitted him for the position he has just resigned. Failing health, however, has recently prevented his taking that active control of the business of the Court which is one of the duties of its chief. His successor is Hon. William Johnston Ritchie, who has heretofore been one of the Justices of the Court. Mr. Ritchie is admitted to be an excellent lawyer and will, we trust, in his new position develope many of the qualities which rendered the appointment of his predecessor so acceptable to the country as chief of the court of highest resort in the Dominion. We congratulate him upon his promotion.

The seat rendered vacant by the promotion of Mr. Justice Ritchie has been filled, as of course, from the Province of Ontario, and the Senior Puisne Judge of the Court of Common Pleas, Mr. Justice Gwynne, has been selected. We are very glad and very sorry. Glad that such a conscientious, hard-working public servant should receive a promotion to which he is justly entitled, and sorry that a Judge in whom both the profession and the public in Ontario have such entire confidence, and a man so esteemed by all, and so beloved by his own intimate circle of friends, should be removed from our midst. We venture to predict that he will not be the least important factor in the Supreme Court, either in the keenness of his intellect or the extent of his learning. His extensive knowledge of equity jurisprudence, also, will render him a most useful member of a Court where so large a portion of the work that falls to it is based on the civil law.

The Supreme Court, for years before its organization, was thought to be almost a necessity. There are those now who think that, owing to the peculiar circumstances of this Dominion, it cannot be of that great practical use and benefit which its founders expected. There are not wanting some who say that it has been in a measure a failure. It is not, therefore, saying too much when we assert that it is now, and will be for some few years to come, on its trial. It has great disadvantages to contend against. If it succeeds in retaining that confidence which the public and the profession were so willing to accord to it when it commenced its labours, those who compose the Court may take credit for having succeeded in a difficult task. We shall not now suggest the possibility of a failure in this, and shall only wish it all success for the future.

DOWER AS AFFECTED BY THE STATUTE OF LIMITATIONS.

(Continued.)

From the digression in the last paper on this subject advocating a change in the law so as to provide for the vesting of the widow's estate in dower immediately upon the death of her husband, we return to consider whether the widow's right is gone ten or twenty years from the husband's death (as the case may be), if she has been all the time occupying the land with her children, but without having her share set apart.

If then the mother remains in possession with her infant children, after her husband's death, by what right or under what title is she there? Not as dowress, it is true. Neither is she to be accounted as tortiously in possession as a trespasser though it is spoken of in the old books as an abatement or disseisin when the widow enters upon the freehold before the actual assignment of dower, yet this is only where she claims to enter *qua* dowress (Dalison 100), and after

the expiration of the forty days of *quarantine*. And upon this point the observations of Mr. Justice Gould are specially noteworthy. In *Goodtitle d. Newman* v. *Newman*, 3 Wils., 519, he is reported thus: "If dower be not assigned to her within forty days may she not continue until it be assigned to her? I think the court would not turn her out, until dower was assigned to her." Whereto counsel for the defendant responded: "It must be admitted that the heir has no right to turn her out before dower be assigned to her." The possession of the widow, in the case put, will be attributed to a rightful entry or continuance in possession in her character of guardian to her infant children, upon whom the estate has descended. In the case already cited, the court say the mother has the right to possession as being the guardian by law of her infant son. She is the guardian in soccage; that is, the person next of blood to whom the inheritance cannot descend: 3 Wils. 527-8.

Now, by Imp. Stat. 31 Geo. 3., c. 13, s. 43, lands in Upper Canada are to be granted in free and common soccage in like manner as lands are held in free and common soccage in England. And it has been held that soccage guardianship is recognized by Canadian law, just as in England. In *Doe d. Moak* v. *Empey*, 3 O. S. 488, it was decided that the possession of a mother during her son's minority was a possession for him, as his guardian. And in *Doe d. Murphy* v. *McGuire*, 7 U. C. R. 311, the mother of an infant on whom lands had devolved by descent from the father was said to be the guardian in soccage, and would have the right to make leases, &c. The same law obtains in many of the States: *Jackson* v. *Vredenbergh*, 1 Johns. R. 163, n; *Combs* v. *Jackson*, 2 Wend. 153; *Jackson* v. *Combs*, 7 Cowen, 36. This guardianship may determine when the ward is fourteen, but not necessarily so. Upon this rather obscure subject, it is said in *Rex* v. *Pierson*, Andr. 313, when the Court of Chancery appoint a guardian, such guardianship doth not cease on the ward's attaining fourteen, unless another guardian be then appointed. And so it is of a guardianship in soccage, though at that age the ward hath a right to choose another guardian.

In the case put by us, it may fairly be contended, then, that till the heirs attain majority, the mother remains in possession of the land as their lawful guardian. Then, are her rights as doweress gone by lapse of time? It will be observed that the Dower Act (Rev. Stat., c. 55, s. 7,) provides that every action for dower shall be commenced by writ of summons, which shall be addressed to the person in actual possession of the land out of which dower is claimed. Sec. 12 provides for service on the tenant of the freehold if no person is in actual occupation of the land. The mother, in actual possession and occupation as guardian, cannot be defendant in a suit wherein she claims as doweress against herself. The statute as framed evidently does not contemplate the case of the claimant being in possession on behalf of her children. But the Dower Act and the Limitation Act (Rev. Stat. c. 108, s. 25,) must be read together as *in pari materia*, and for the reason also given by Lord Westbury, that we are to deal with the Consolidated Statutes as one great Act, and to take the several chapters as being enactments which are to be construed collectively and with reference to one another, just as if they had been sections of one statute, instead of being separate Acts: *Boston* v. *Lelievre*: L. R. 3 P. C. 152.

But without laying undue stress upon the frame of the Statutes as indicating a suspension of the right of suit for dow-

er in the circumstances under consideration, another aspect of the case may be adverted to as leading to the same conclusion. The law appears to be well settled by all the old authorities, that, when after the death of the husband the heir makes a lease for years of the land to the wife, her dower therein is suspended during the lease, because she cannot demand it against herself: Jenk. Cent. p. 73, pl. 38; Vin. Abr. Dower, x, pl. 20; Perkins, s. 350; Fitz. N. B. 149 E. and note; Watkins on Descent, pp. 76, 77. Being in possession as guardian, she is the proper person to assign dower, and is for that reason not competent to endow herself: *Shipland* v. *Ryder*, Cro. Jac. 98; Litt. Sec. 48 and 123; *Osborne* v. *Carden*, Plowd. 293. The reasons against dower being assigned while she is in as guardian are quite as strong as in the case of her holding under a lease from the heir. We submit that in such case the right to bring an action of dower is suspended, and that the period of limitation is also suspended, and does not run so long as the double character of guardian in possession and claimant in dower co-exists in the same person. This class of exception from the Statute of Limitations does not fall under the category of any of these disabilities, but is akin to cases of exemption enjoyed, when, for example, the debtor takes out administration to his creditor: *Seagram* v. *Knight*, L. R. 2 Ch. Ap. 629.

SELECTIONS.

MECHANICS' TOOLS.

In looking over the subject of statutory exemptions from execution, of late, we have been somewhat amused by the different interpretations which courts have put upon some words, as for example the word "mechanic." It would naturally be supposed that the meaning of this word is settled beyond cavil. Webster defines it, "a person whose occupation is to construct machines, or goods, wares, instruments, furniture, and the like." But in the construction of the statutes in question, the courts have been so liberal as to strain this word, as it seems to us, beyond its normal capacity, and to embrace within its scope some occupations which can hardly be said, in the proper and ordinary use of language, to be "mechanical." For instance, in the case of *Maxon* v. *Perrott*, 17 Mich. 332, the court held that a dentist is to be regarded as a "mechanic," within the intent of the statute. The court observed: "A dentist in one sense is a professional man, but in another sense his calling is mainly mechanical, and the tools which he employs are used in mechanical operations. Indeed, dentistry was formerly purely mechanical, and instructions in it scarcely went beyond manual dexterity in the use of tools; and a knowledge of the human system generally, and of the diseases which might affect the teeth and render an operation important, was by no means considered necessary. Of late, however, as the physiology of the human system has become better understood, and the relations of the various parts and their mutual dependence become more clearly recognized, dentistry has made great progress as a science, and its practitioners claim, with much justice, to be classed among the learned professions. It is nevertheless true that the operations of the dentist are for the most part mechanical, and, so far as tools are employed, they are purely so, and we could not exclude these tools from the exemption which the statute makes, without confining the construction of the statute within limits not justified by the words employed."

On the other hand, in *Whitcomb* v. *Reid*, 31 Miss. 567, the court says: "A dentist cannot be properly denominated a 'mechanic.' It is true that the practice of his art requires the use of instruments for manual operation, and that much of it consists in manual operations; but it also involves a knowledge of the physiology of the teeth, which cannot be acquired but by a proper course of study; and this is taught by

learned treatises upon the subject, and as a distinct though limited department of the medical art, in institutions established for the purpose. It requires both science and skill, and if such persons could be included in the denomination of 'mechanics,' because their pursuit required the use of mechanical instruments, and skill in manual operation, the same reason would include general surgeons under the same denomination, because the practice of their profession depends in a great degree upon similar instruments and operative skill. Nor could such a pursuit be properly said to be a trade."

Here we have both sides of the question judicially presented, and we must vote with Mississippi. The only operations of dentistry that seems to us to be *mechanical* are those connected with the manufacture of artificial teeth. It is unquestionable that one who makes cork limbs or glass eyes is a "mechanic," and the mere operation of making artificial teeth is mechanical; but the fitting of such teeth requires so much knowledge of the human body as to remove it from the domain of mere mechanical art, and to render it a species of surgery, like the operation of forming a new skin from pieces of skin taken from other living persons. A surgeon constructs a new nose over a silver plate, and sews a wound, and wires together a fractured limb to assist the process of knitting, and trepans a skull, and we do not denominate these operations mechanical. Certainly, the removal of the whole or part of a deceased tooth is no more mechanical than the surgical operation of removing a portion of the deceased jaw itself, and the question of the propriety of removing a tooth sometimes involves the exercise of considerable physiological knowledge. So of the treatment of the nerves of the teeth. It is true that we usually speak of a dentist's *tools*, and of a surgeon's *instruments*, but the latter are really just as much tools as the former. A chiropodist is defined "a surgeon for the feet," and could scarcely be regarded as a *mechanic;* and yet his calling involves much less professional knowledge than, and is commonly regarded as much inferior to, the occupation of a dentist. The numerous "colleges of dentistry" would feel quite hurt by the imputation that their graduates are "mechanics," and so, we suppose, would the profession at large, especially those who have taken their degree, and write themselves D. D. S. But these honours have to be paid for, just as the lawyer, of whom we recently heard, resenting the inquiry by the innkeeper, whose guest he was, if he was a "commercial traveller," was charged a dollar a day extra for his pride.

As to the words "furniture," "tools," or "implements," "necessary to a trade or business," there has been an extreme liberality of construction. Possibly a piano may reasonably be called an "implement;" certainly not "furniture," or a "tool:" *Amend* v. *Murphy*, 69 Ill. 337. And a cornet may be a tool of trade: *Baker* v. *Willis*, 123 Mass. 194. Doubtless a merchant's commercial books, counting-house furniture, and iron safes, may be regarded as "instruments necessary for the exercise of the trade, or profession:" *Harrison* v. *Mitchell*, 13 La. Ann. 260. So a shovel, pickaxe, dung fork, and hoe are "tools of occupation:" *Pierce* v. *Gray*, 7 Gray 67. But how about a farmer's plough, cart wheels and rigging, harrows, drag, etc., which have been held "tools?" *Wilkinson* v. *Alley*, 45 N. H. 551. Webster defines a *tool*, "an instrument of *manual* operation." Printing presses, cases and types may come within this definition: *Patten* v. *Smith*, 4 Conn. 450. A fisherman's net and boat have been held *tools*: *Samis* v. *Smith*, 1 T & C. 444. The *net* certainly is, but is the *boat?* The *boat* comes nearer to it, at all events, than cart wheels, harrow or drag. A milliner's clock, stove, screen, pitcher, and table cover must have been regarded as "fixtures;" certainly not tools nor implements: *Woods* v. *Keys*, 14 Allen, 236. In regard to a book-binder's stove, desk, etc., it has been said, "being common to most kinds of business, they cannot in any proper sense be said to be the tools of any particular trade:" *Seeley* v. *Gwillim*, 40 Conn. 106. A canal boatman's tow line was exempted as a working tool (*Fields* v. *Moul*, 15 Abb. 6), but what then is *manual* about it, unless the claimant was destitute of a horse and towed his boat by hand, we

fail to see. A hunter's gun, where there is no statute exempting arms, is very properly regarded as a *tool*: *Choate* v. *Redding*, 18 Tex. 581. Thus we have soldiers taught the "*manual* of arms." But the longest stretch of construction we know of is that which holds a watch, hung up in the house of a family having no clock, or necessary to the prosecution of the debtor's business, to be a working *tool*: *Bitting* v. *Vandenburg*, 17 How. (N. Y.) 80. A decidedly more reasonable view, it seems to us, is taken in *Rothschild* v. *Bolten*, 18 Minn. 361, where it is held that a cigar-maker's watch, used to time his workmen, is not exempt as an *instrument* used and kept by the debtor for the purpose of carrying on his trade. The court says: "It is not kept or used for the purpose of carrying on his trade, *i. e.*, to make cigars with, but for his own convenience in keeping the account between himself and those by whom he makes cigars. His workmen could make as many and as good cigars, if he were to keep their time, and 'regulate his duties,' whatever that may mean, by the sun."—*Albany Law Journal.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From Q.B.] [January 15.

EGLESON v. HOWE.

Assignee of mortgage—Right of mortgagor to set up payment under former mortgage.

Held, reversing the decision of Harrison, C. J., sitting alone and overruling *Henderson* v. *Brown*, 18 Gr. 79, that a mortgagor who has purchased land subject to a mortgage which the vendor has agreed to pay off, and has himself given a mortgage to the vendor for the balance of purchase money, cannot set up payment of such prior mortgage under threat of proceedings against the land in an action upon such mortgage, brought by the person to whom it had been assigned.

Beaty, Q.C., and *A. Cassels*, for appellant.

Robinson, Q.C., and *H. J. Scott*, for respondent.

Appeal allowed.

From Chy.] [January 15.

CROSSMAN v. SHEARS ET AL.

Partnership — Sale of chattel — Notice — Estoppel.

In 1867 the defendant S. entered into an agreement with the plaintiff for an advance of money to enable him to perform a stipulation in a lease made to him a short time before for the period of seven years by the Rossin House Hotel Co., that he would expend $10,000 in providing furniture, &c. for the hotel. The agreement was as follows: "Said E. D. C. agrees to advance the money necessary to open the Rossin House in Toronto, not exceeding the sum of $10,000, and G. P. S. to pay interest on one half the amount till repaid to E. D. C., and each party to share equally in all profits, articles of furniture, supplies, &c. put in the said house, and E. D. C. to have a chattel mortgage on everything belonging to both parties, until the half of all the money advanced is repaid to E. D. C., signed G. P. Shears." After the expiration of the term there were negotiations between the plaintiff and S. for a settlement. in the course of which the latter rendered statements to the plaintiff in which he assigned a value to the furniture and treated it as an asset belonging to them jointly. After these negotiations S. continued to carry on the business of the hotel without any dissent by the plaintiff under a new lease, which had been granted to him by the Hotel Company before the expiration of the original term. In 1875, S. becoming embarrassed, a new arrangement was concluded between him and the company, by which he surrendered the old lease and obtained a new one for term of 10 years; and, in consideration of an advance of money and arrears of rent, he executed a bill of sale to the company of the furniture. The lease contained a stipulation, that on certain conditions being performed, the furniture should at the end of the term belong

to S. Subsequently S. assigned this lease to one I. who had actual notice of the plaintiff's interest in the furniture. Evidence was given to prove that the company had notice of the relation existing between S. and the plaintiff in reference to this furniture. There was no evidence to shew that the plaintiff knew of this transaction until after it was consummated, when he promptly repudiated it.

Held, reversing the decree of Blake, V.C., that the evidence proved a partnership between the plaintiff and S.; and being joint owners of the furniture, S. had no power to convey the plaintiff's interest therein, even in the absence by the company of any notice of the partnership.

Held also, that the plaintiff was not estopped by his conduct from asserting his right to the furniture.

C. Moss (*J. T. Small* with him) for the appellant.

Crooks, Q.C., (*Kingstone* with him) for the respondent, the Rossin House Hotel Co.

Howell for official assignee.

Morphy (*Winchester* with him) for the respondent Irish.

Appeal allowed.

From Q. B.] [January 15.

Erb et al. v. Great Western Railway.

Bill of lading.—'Liability of railway company for fraudulent receipts issued by agent.—31 Vict., c. 11, R. S. O., c. 116.

The agent of defendants at Chatham, a station on their line, having authority to grant bills of lading and shipping receipts for goods to be forwarded by the railway from that station, issued such documents representing certain flour to have been shipped by or received from B. & Co., and to be delivered to the plaintiffs at St. John, N.B. B. & Co. were a firm of millers at Chatham, of which the defendants' agent was a partner, and the bills of lading and receipts were fraudulently issued by such agent, no flour having been received by him. Bills of exchange drawn by B. & Co. on the plaintiffs and annexed to these bills of lading and receipts were discounted by a bank at Chatham, for B. & Co., and forwarded to the plaintiffs, by whom they were accepted and retired.

Held, per Moss, C. J. A. and Burton, J. A., that defendants were not liable to the plaintiffs, for the agent in giving receipts for goods never received, was acting outside his authority and ceased to represent his principals. A principal is only liable for tort of agent when the misrepresentation is made, or other wrongful act is committed by the agent in the usual course of his employment and for the benefit of his master, or where the master has authorized, sanctioned, or ratified it.

Per Moss, C. J. A.—Entrusting an agent with certain powers and given duties is not a guaranty that he will not abuse those powers for his own fraudulent ends.

Per Burton, J. A.—A bill of lading is not a representation to the persons to whom it is endorsed, that the statements therein contained are true and may be relied upon.

Per Patterson, J. A, and Blake, V.C.—The defendants were liable to the plaintiffs for the damage they suffered.

Per Patterson, J. A.—Bills of lading are made effectual by statute as securities or representatives of value, on which money may be obtained, and persons dealing with them are not bound to enquire into the truth of the facts stated therein. Being by statute negotiable and representing goods, and being securities upon which advances can be obtained, the carrier gives them, not only with the knowledge that they may be acted upon, but with the intent that they shall be acted upon. They are representations that the facts are as therein stated, and on the faith of which money may be advanced.

Per Blake, V.C.—The plaintiffs were, under the circumstances, entitled to conclude that whatever the agent could do as shipping agent and did do, was done by the company, and that in this case the company intended to and did represent that the flour was shipped according to the tenor of the bill of lading.

Bethune, Q.C., (*Durand* with him) for the appellant.

M.C. Cameron, Q.C. and *C. Robinson*, Q. C., for the respondent.

Appeal dismissed.

From Q.B.] [January 15.

Lucas v. Corporation of Moore.

Highway -- Want of repair—Misdirection. 36 Vict. c. 48, sec. 409.

The plaintiff's husband lost his life by falling with his horse and sleigh into a ditch or drain, which occupied part of an allowance for road in the township of Moore, along which deceased was driving at night. The ditch was about 12 feet deep and 32 feet wide, extending about half-way into the travelled road, which was 30 feet wide. The road had been in this state for some years, but it appeared to serve the purpose of the neighbourhood as a highway. There was no railing or other guard round the ditch, and nothing to indicate the situation on a dark night, such as the night in question was. It was alleged that the deceased was under the influence of liquor, but there was no direct evidence as to how he fell into the ditch.

The learned Judge, at the trial, told the jury that if the defendants were indicted for having the road in the position described they would be directed to find them guilty of having the road out of repair. He also told them that where a ditch became such a deep and dangerous place as this the Corporation were bound to put a guard on it, otherwise as a matter of law they were guilty of neglect in not guarding it; but he proceeded to say :—I declined to withdraw the case from you on the ground of there being no evidence to show a want of repair, not because I was going to rule to you that the road was out of repair, but because I thought there was ample evidence to go to you as twelve reasonable men that this road was out of repair. It is a matter entirely for you—was that road in such a reasonable state of repair that it was safe for persons passing and re-passing at all times night and day? If so you will find a verdict for the defendants.

Held, reversing the judgment of the Queen's Bench, that the remarks above referred to were more than a strong comment on the evidence, and that there was clearly misdirection, as it was impossible to say as a matter of law that the statutory duty to keep the road in repair had been neglected by the existence and continuance of the ditch or by its being without a guard, that being a deduction of fact to be made by a jury upon a consideration of all the circumstances.

Held, that the obligation expressed by the words "keep in repair," as used in 36 Vic. c. 48, sec. 409, is satisfied by keeping the road in such a state of repair as is reasonably safe and sufficient for the requirements of the particular locality; and that there was non-direction in the attention of the jury not being called to the duty of modifying the force of the word "repair" by reference to surrounding conditions.

Robinson, Q.C., and *Ferguson*, Q.C., for the appellants.

Bethune, Q.C., for the respondents.

Appeal allowed.

From Q.B.] [January 15.

McArthur v. Eagleson.

Ejectment—Statute of Limitations—Estoppel.

The plaintiff left his wife and home more than thirty years ago, and went to the United States where he remained until a short time before this action. He held no communication with his wife or friends while absent, and was, until his return, believed to be dead. Seven years after his departure his wife acting on this belief married again, and lived with her new husband on plaintiff's farm. They both mortgaged the farm to a building society which sold it under a power of sale in the mortgage. On his return the plaintiff brought ejectment against the purchaser from the company.

Held, affirming the judgment of the Queen's Bench, that he was not estopped by his conduct from claiming the land, and that he was not barred by the Statute of Limitations, as the possession of his wife was his possession.

Robinson, Q.C., (*G. McKenzie* with him) for the appellants.

Rock, Q.C., and *Ferguson*, Q.C., for the respondent.

Appeal dismissed.

From Q. B.] [January 15.

Dennison v. Leslie.

Railway Company—Proof of defendant being a shareholder.

In an action against defendant as a shareholder for unpaid stock, it appeared that the defendant signed the stock book which was headed with an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of any of our said respective shares," they covenanted to pay the company ten per cent. of the calls of said shares and all future calls. The directors subsequently passed a resolution directing the secretary to issue allotment certificates for each shareholder for the shares held by him. The secretary accordingly prepared such certificates, which certified to the subscriber that the company in accordance with his application for—shares * * had allotted to him—shares amounting to ——. The certificates were delivered to the company's broker to deliver to the shareholders. A ledger account was also opened with each subscriber in the books of the company. There was no evidence to show any formal notification to the defendant of the above resolution, or that a certificate of allotment had been issued; and he never paid the 10 per cent. He said that he had no recollection of being asked for the 10 per cent.; but he admitted that he had received notices asking for payment, and that he supposed the first notice he received was for the 10 per cent. The evidence showed that he did not consider that he was entitled to any notice, and that he based his belief that he was not a shareholder simply on the ground that he had not paid the 10 per cent.—never even in the witness-box setting up his want of knowledge of the acceptance by the company.

Held, affirming the judgment of the Queen's Bench, that the evidence was sufficient to show that knowledge of an acceptance of his offer by the company had reached the defendant, and that he was therefore liable as a shareholder.

McDonald for the appellant.

Kennedy for the respondent.

Appeal dismissed.

From C. C. Lanark.] [January 15.

Re Code v. Crain.

Insolvent Act of 1875—Deed of composition to co-partners—Requisite number and proportion of value.

Code and Crain became insolvents as a firm and individually. As co-partners they were indebted to 25 creditors. Claims to a large amount were proved against Crain individually by 29 of his separate creditors. No separate creditor of Code proved against him individually. A deed of composition and discharge providing for a cash payment of two cents on the dollar, in full of claims against the insolvents, whether as partners or as individuals, was signed by a majority of the whole body of creditors, taking those who proved claims against the joint estate and against the separate estate as one class. These signing creditors also represented three-fourths of the claims proved against the joint and separate estates. The deed was also signed by a majority in number of the separate creditors of Crain, representing three-fourths of all claims proved against him individually. But the deed was not signed by a majority in number, or by representatives of three-fourths in value of the creditors who had proved against the firm.

Held, reversing the judgment of this County Court, that the deed of composition and discharge could not be confirmed, as the insolvents had not obtained, within the meaning of the Act, the assent of the proportion of their creditors in number and value required by law.

Crerar, for the appellants.

Boyd, Q.C., and *Cassels*, for the respondents.

Appeal allowed.

From C.C.. Norfolk.] [January 15.

Furness v. Mitchell.

Married woman—Tenant by the curtesy.

Held, (Patterson, J. A. dissenting) that under 35 Vic., c. 16, sec. 10, a husband was not deprived of an estate by the curtesy in any lands of his wife which she had not disposed of *inter vivos* or by will.

Bethune, Q.C., for the appellant.

Barbour and *H. J. Scott* for the respondent.

Appeal allowed.

CHANCERY.

Proudfoot, V. C.] [January 6.

Sands v. The Standard Insurance Co'y.

Fire insurance—Alienation—Mortgage—Additional condition.

By an additional condition endorsed on a policy of insurance against fire, covering chattels, it was declared that "when property (insured by this policy) or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or any interest therein without the consent of the company, first endorsed hereon, or if the property hereby insured shall be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or in equity, this policy shall cease to be binding on this Company:"

Held, that this did not prevent the owner from creating a mortgage on the property covered by the policy, without notice to or assent of the Company.

Moss, C. J. A.] [January 7.

Pressy v. Trotter.

Mortgagor and mortgagee—Assignee of mortgage—State of accounts—Existing equities.

The rule that an assignee of a mortgage takes, subject to all the existing equities and the state of accounts between the mortgagor and mortgagee was acted upon and applied in a case where, in 1875 a married woman created a mortgage, in which her husband joined, and it was agreed that any balance then due by the mortgagee to the husband as soon as ascertained should be applied on the mortgage, and that any future accounts that might become due to the husband for lumber and work supplied to or done for the mortgagee should also be so applied; which mortgage was about fifteen months afterwards sold and assigned by the mortgagee to a purchaser without notice of such understanding or agreement, he having obtained such assignment as security for any deficiency that might be found to exist upon the realization of a mortgage then held by the purchaser against the mortgagee; and having taken the assignment without inquiring as to the state of accounts, or the title to the lands.

CANADA REPORTS.

ONTARIO.

CHANCERY CHAMBERS.

(*Reported for the* Law Journal *by* F. Lefroy, *Barrister-at-Law.*)

Bickford v. Pardee.

Execution—Setting aside—R. S. O. c. 66, sec. 72.

Where a decree ordered B to give A a note as the price of certain railroad iron to be forthwith delivered to B by A, the quantity and weight thereof to be ascertained by the Master, and the price adjusted accordingly; and also, in another clause, ordered A to deliver to B selected rails up to a certain value, and B forthwith to give A a note for the value thereof, and that A should thereupon enter into a certain covenant in regard to them; and that in default of delivery of the said notes the amounts should become immediately due from B: *Held*, such a decree is not a "judgment" within R. S. O. cap. 66, sec. 72, on which a *fi. fa.* could, on such default, be issued *ex parte* on mere filing of affidavit with C. of R. and W., but that a reference was necessary.

[Mr. Stephens, Referee.

In this suit a decree had been obtained, by which it was decreed (1) that a certain agreement, as subsequently modified, should be carried into execution; (2) that the defendants, L. and P., should forthwith deliver to the plaintiffs the promissory note of the defendant P. for $17,000 as the price of the railroad iron on the wharf at Belleville, and that the plaintiffs thereupon should deliver to the defendants the said railroad iron, and on this delivery the quantity and weight should be ascertained, and, in case of disagreement, the Master should determine it, and if the value at the prices in the said agreement fixed fell short of the said sum of $17,000, the deficiency should be credited by endorsement on the said note, and if in excess, the defendants should deliver a similar promissory note of the said defendant P. for the excess; (3) that on the plaintiffs delivering to the defendants selected rails not exceeding a certain value then lying at Port Stanley, the said defendants should deliver to the plaintiffs the promis-

sory note of the said defendant P. for the value of the said rails at the rate named in the said agreement, and that the plaintiff should thereupon covenant that the said rails should be accepted by the Government engineer for the purpose of certifying for Government aid; and (4) the Court further ordered that on default of delivery of the said notes, the amounts should immediately become due and payable by the defendants.

Executions were afterwards issued on the clauses (2) and (3), upon affidavits filed with the Clerk of R. and W.

Arnoldi now moved on behalf of defendant L. to set aside these executions, on the grounds (1) that the Clerk of R. and W. had no right to issue execution in such a case as this, but that application ought to have been made in chambers, and all the material facts disclosed, and the execution should not have been issued *ex parte*; (2) that there was a fresh agreement subsequent to the decree and superseding it, by which defendant L. was released from liability; (3) that the Master had given no decision under clause 2 of decree, nor had the engineer's certificate been obtained as required by clause 3; (4) that as the whole state of the facts referred to in (2) and (3) had not been called to the attention of the Clerk of R. and W., there was a *suppressio veri*, and, therefore, the executions should be set aside.

H. Cameron, Q.C., *contra*.—(1) The original agreement shewed that L. & P. were jointly liable, and the decree was drawn on that supposition; (2) as to amount due on part of the Belleville iron, there had never been any dispute, and if execution had been properly issued for any part it could not be set aside *in toto*; (3) as to the Port Stanley iron, the provision as to the certificate was only a covenant, not a condition precedent; and a sufficient certificate had been obtained.

Hoyles, for defendant P. submits that the writs, if set aside as to one defendant, must be set aside as to both.

The Referee held that the decree in this cause was not a "judgment" within the meaning of the Act (Rev. Stat. O., cap. 66, sec. 72), on which a writ of *fi. fa.* could properly be issued *ex parte*, and on the mere filing of an affidavit in the office of the Clerk of R. and W., but that some further adjudication was necessary by which the amount due to the plaintiff should be ascertained and determined. That, as to the Belleville iron, in clause 2, a *fi. fa.* could not properly be issued merely because the delivery of *a portion* of the iron was not disputed. The parties failing to agree, the whole amount due under this section should have been ascertained and determined by the Master. That, as to the Port Stanley iron, numerous points had arisen requiring judicial decision, *e. g.*, as to the alleged new contract, and as to whether a sufficient certificate by the Government engineer had or had not been obtained. The learned Referee concluded as follows. "I think that these are points which could not properly be decided in his own favour by the plaintiff himself, by the mere filing of an affidavit. The quantity of rails delivered has not been ascertained by any agreement of the parties. . . . I think the last clause of the decree expressly provides for a reference to the Master to determine all such points as these, and this not having been done, the *fi. fas.* should be set aside."

Order granted.

McTaggart v. Merrill.

Service by publication—Notice of motion to confirm decree—R. S. O. c. 40. secs. 93, 94.

Where leave had been obtained to serve an order of revivor by publication, leave was also given to serve a notice of motion to confirm decree by publication, though contrary to English Practice.

[Mr. Stephens—Blake, V. C.

In this suit a decree was obtained after the decease of the original defendant and before revivor. Afterwards leave was obtained to serve an order of revivor by publication.

Hoyles now moved for an order allowing service by publication of notice of motion to confirm decree or substitute a new decree. He read the affidavits filed on obtaining leave to serve the order of revivor by publication, and cited Daniel, 5th ed., p. 723; *Lechmere* v. *Clamp*, 29 Bea. 259; 30 Beav. 218; R. S. O. c. 40, secs. 93, 94;

Taylor's Orders, 3rd ed., p. 35, 76; Morgan's Chy. Stats., 4th ed., p. 422, 425, 478.

The Referee held that, since under the English decisions above mentioned (29 Beav. 259, and 30 Beav. 218), although notice of motion for decree was not allowed to be served by publication, yet, by a more roundabout process, the decree was actually pronounced, with no other notice to the defendants than by advertisements—and seeing that under our practice the only mode of bringing a defendant before the Court is by serving him with notice of motion, and that R. S. O. c. 40, secs. 93, 94, seems to allow a much wider latitude as to service—it appears only in accordance with the decisions to allow the orders asked for. But, before incurring the expense of advertising, &c., he thought it was desirable to take the opinion of a Judge.

Blake, V.C., on reference to him, held that the view taken by the Referee was correct.

Wilson v. Wilson.

Costs—Interpleader Issue in Co. Ct.—Conflicting decision in Q. B. on the same point.

Where the Court of Chancery had, with consent of all parties, directed an interpleader issue to be tried by the County Court, which was settled on a point of law, and not as a question of fact, and judgment obtained by the defendant, he was allowed the usual order for costs, although notice of appeal had been served, and although there was a conflicting decision in the Q. B. on the very same point.

[Mr. Stephens, Referee.

In this matter an execution creditor declining to admit the *bona fides* of a mortgage, under which the property in question was claimed, an issue was directed by the Court of Chancery to be tried by the County Court. At the trial no oral evidence was given, but the attack on the mortgage was confined to points of law. A formal verdict was entered for the claimant, which was afterwards set aside in Term.

Donovan now moved, on behalf of the execution creditor, for an order for costs of the trial of the interpleader issue.

Doyle, contra: (1) notice of appeal has been served, and until the appeal is disposed of the application for costs is premature; (2) upon similar objections to the same mortgage the Queen's Bench had lately decided in favour of its validity, and as it is a pure question of law, this Court wil accept the decision of the Queen's Bench in preference to that of the County Court; (3) there was no jurisdiction in the Court to make the interpleader order, and therefore the trial and all proceedings under it are a nullity: R. S. O., cap. 40, sec. 99. When the interpleader order was obtained it was not stated that the matter in dispute was a pure question of law, and not a question of fact, *O'Donohoe* v. *Wilson*, 42 U. C. R. 329; (4) the order was granted under R. S. O., cap. 40, sec. 99, not under R. S. O., cap. 54, sec. 22.

Donovan, in reply: (1) the order was granted under R.S.O., cap. 54, sec. 22. The County Court Judge is, in such cases, in the position of arbitrator, and there is no appeal except to the Court of Appeal: R.S.O., cap. 54, sec. 23; (2) the fact that the higher Court gave a different decision makes no difference as to the costs: *Craig* v. *Phillips*, W. N. 271; L. R. 7 Chy. Div. 249; *Queen* v. *Doty*, 13 U.C.R. 398. The Court will not review the decision on the interpleader issue: *Gourlay* v. *Ingram*, 2 Chy. Ch. 309.

Hoyles, for Sheriff: Claimant cannot now raise such an objection, as he submitted to the order. It was at the request of all parties that the issue was tried in the County Court.

The Referee—As to the first objection, the interpleader order was granted on the application of the Sheriff on the usual material, and the issues are drawn in the established form. All parties were represented on the application, and no objection was then taken by the claimant that such an order could not properly be made. On the contrary he pressed his claim; the execution creditor resisted it, and both assented to the order. If any one knew at that time that there would be no issues of fact to be tried it must have been the claimant, but he did not take the objection. The interpleader issue was prepared and delivered and both parties appeared at the trial and submitted to the jurisdiction. If there is anything in the point raised, I think it is to

late for the claimant to take it now. I do not think that the trial and all the previous proceedings became a nullity merely from the fact that after the plaintiff in the interpleader issue had completed the evidence in support of his case, the defendant chose to submit to the Court that in law the plaintiff had not established his right to the goods, rather than offer evidence on his own behalf on questions of fact.

Then the application is resisted on the ground that the Court of Queen's Bench has given a different decision in a case that came before it on the same chattel mortgage. The case of *Craig* v. *Phillips*, L. R. 7 Chy. Div. 249, is authority for the position that this is no reason for extending the time for appealing, and it necessarily follows that it is no ground for refusing to give to the successful party the fruit of his judgment. There is in this case a verdict and a decision of a Court which has not been reversed or varied. I think the usual order for costs must follow. Of course if any proceedings are taken by way of appeal or otherwise to set aside the judgment, application can be made to stay execution.

Order granted.

On appeal, the order of the Referee was confirmed, and the appeal dismissed with costs.*

Sadlier v. Smith.

Scandal—Taking affidavit off the files—Motion or petition.

Held, That an application may be made on behalf of the solicitor of a party, to take an affidavit off the files for scandal, without special leave of the Court;—and such an application may be made on motion. *Semble*, such an application may properly be made against a witness, as well as against a party.

[Mr. Stephens—Proudfoot, V.C.

Donovan moved for an order to take off the files of the Court, or to refer to the Master, a certain affidavit for scandal, as to the plaintiff's solicitor, and for impertinence as to the plaintiff, citing *Ex parte Simpson*, 15 Ves. 476; *Bishop* v. *Willis*, 5 Beav 83 (n).

Morphy, contra. (1.) No such application can be made without special leave of the Court so far as the solicitor is concerned: Dan. Chy. P., 5th Ed. 293; *Williams* v. *Douglas*, 5 Beav. 82, 6 Jur. 379, over-rides *Ex parte Simpson*; (2.) no such practice now exists as referring for impertinence: Dan. 789, 292; Taylor's Orders, p. 158, G. O. 70; (3.) notice of motion did not specify parts complained of; (4.) application must be made when the motion on which affidavit is issued comes on to be heard: *Reeves* v. *Baker*, 13 Beav. 437.

Ewart, for the witness who had sworn the affidavit, viz., the clerk of the defendant's solicitor, contended: (1.) such an application cannot be made against a mere witness: *Ex parte Kirby*, Mont. 68; (2.) the application should be made by petition; (3.) exceptions for scandal or impertinence being now abolished, the scandalous matter must be pointed out. He cited Taylor's Orders, G. O. 6, 69, 70, 71.

The Referee held on authority of *Williams* v. *Douglas*, that the leave of the Court must first be obtained before a solicitor can make such a motion; which is laid down as still the law in Dan. 5th Ed., 294; and that no such order could be made against the clerk who had sworn the affidavit, unless perhaps where a case of gross personal misconduct was made out against him, as, in the absence of evidence to the contrary, he must be taken to have acted under the direction of his principal.

Application dismissed.

On appeal, Proudfoot, V.C., held in effect: (1) There are not two distinct statements, but the same statements are in one point of view scandalous as to the solicitor, and in another impertinent as to the plaintiff. It was, perhaps, unnecessary to refer to the impertinence, but if an impertinent affidavit is also scandalous, it may be taken off the files. (2) As to the notice not specifying the scandalous parts, this omission was not considered by the Referee and is not now in question. It may be the whole affidavit is scandalous. (3) As to special leave being necessary for the solicitor to join in the motion, *Williams* v. *Douglas*

* See the note on this case in the Notes on Cases, ante, p. 25—Rep.

seems to be misapprehended. The whole reasoning of the M. R. therein proceeded upon the fact that that was an *ex parte* order; and all he meant by saying that a person not a party to the record needed *special leave* and a *special order* before he could apply to get scandalous matter expunged, was that the application and order could not be made and obtained *ex parte*. (4) As to whether the application should be made on motion or petition, the learned V. C. said: "There is no very definite principle by which to determine when the proceeding should be by petition and when by motion. It is said the only approximation to a rule is that a motion is proper when the issue tendered is simple, though it may involve a great mass of evidence; and a petition is the proper course when several distinct issues are tendered, though each may require very little evidence to support it: Drew Eq. Pl., 93. And under the present practice many matters are brought up on motion that formerly required a petition, or may be applied for indifferently in either way." He referred, in illustration, to *Harris* v. *Meyers*, 1 Chy. Ch., 262, and *Jones* v. *Roberts*, 12 Sim. 189, and then continued: "In the present case the issue is a simple one, scandal or no scandal, and I see no reason why the application may not be made on motion. There are no new facts to be introduced into the cause, it is only sought to determine if statements in an affidavit imputing improper conduct to a solicitor, for which there is no adequate remedy if improperly introduced and allowed to remain on the files of the Court, a standing and continuous slander—are to be allowed to remain on the files." (5) As to whether the motion could properly be made against the clerk who swore the affidavit, the learned Vice-Chancellor, after remarking that *Ex parte Kirby*, Mont. 68, which was the precedent the motion followed in this respect, did not dispose of the point, said: "I have not been furnished with any case in which the order has been made against the clerk, and, perhaps, it is premature to discuss the question until it is ascertained that the affidavit is scandalous. I may say, however, that if no precedent is to be found, I am prepared to make one, and I think that the application, under the circumstances of this case, may properly be made against an offending witness as well as an offending party. See Story Eq. Pl., sec. 881, a. I therefore reverse the order of the Referee, with costs, and direct him to hear the application of the plaintiff and his solicitor."

*Appeal allowed.**

Simon v. La Banque Nationale.

Security for costs—Application to have amount increased—G. O. 421.

Where an order for a certain sum, as security for costs, had been obtained, and the cause coming on, the hearing was postponed. *Held*, on appeal, that then, if ever, was the time to apply for further security—*i. e.* as one of the terms of allowing the postponement.

[Mr. Stephens—Blake, V.C.

In this suit the defendants had already obtained an order for $400 as security for costs, and when the cause came on for examination and hearing, the hearing had been postponed, but no application had at that time been made for further security.

Snelling now moved for an order that plaintiff should give further security. He cited *Imperial Bank of China* v. *Bank of Hindostan*, L. R. 1 Chy. App. 437; *Western of Canada Oil Company* v. *Walker*, L. R. 10 Chy. App. 628; *Republic of Costa Rica* v. *Erlanger*, L. R. 3 Chy. Div. 62.

Cassels, contra, referred to G. O. 321 The defendants had themselves taken out the order with the amount settled at $400, and no leave to apply to have the amount increased was reserved. There was no special order in this country to help defendants as in *Costa Rica* v. *Erlanger*. He also cited *Ganson* v. *Finch*, 3 Ch. 296.

Snelling, in reply: It is not necessary to ge rid of first order before applying. Defendant could not know before answer that the costs would be so heavy.

The Referee—I do not think the defend-

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* This matter was afterwards heard before the Referee on the merits and an order was made, expunging a large portion of the affidavit for scandal- -containing, as it did, personal matter not relevant to the matter in issue.—Rep.

ants are estopped from applying for further security merely because they have already obtained an order for $400.

On appeal, Blake, V. C., held that the defendant should have applied for an order requiring the plaintiff to give fresh security for costs, when the cause came on for examination and hearing, and as a term of allowing the postponement of the hearing. It was not done then, and should not be allowed now.

Appeal allowed. No costs to either party, the point not having been taken in the argument before the Referee.

Finkle v. Date.

Leave to appeal from Master's decision after the fourteen days.—G. O. 253.

Where the nominee and confidential agent of one party had been appointed receiver against the wish of the other party, and where the delay had not been great and was in some measure explained, leave was given to appeal, though the fourteen days had expired.

[Mr. Stephens—Sept. 6, 1878.

In this suit an appeal had been made to the Referee from the Master's decision appointing a Receiver. This application was made within the fourteen days (G. O., 253) —but was dismissed.

Murdoch now moved for leave to appeal from the said decision. The fourteen days had now expired. He urged that part of the delay was caused by hesitation as to whether to appeal from former order, and he cited *Simpson* v. *Ottawa and Prescott Railway Co.*, 1 Chy. 99; *Nash* v. *Glover* 6 Prac. R. 267.

Hoyles, contra. Court will not interfere with appointment of Receiver except in extreme cases: Kerr on Receivers, 108. The delay had not been accounted for. The Receiver could be removed if he misconducted himself.

The Referee—I am not strongly impressed with the merits of the defendant's case for appeal, but there is the question whether Mr. S., the nominee and the confidential agent of the plaintiffs, should have been appointed Receiver in opposition to the wish of the defendant, and this is one which I think should be finally disposed of by a Judge. The defendant showed his dissatisfaction with the Master's finding and his intention to appeal by his former unsuccessful motion in Chambers which was made in time, and a portion at least of the delay since, which has not been very great, was taken up in considering whether to appeal from that order or make the present application. Under all the circumstances of the case, the delay is not, I think, so great as to preclude me from making the order asked.

Order granted on payment of costs of application.

Re Gilchrist.

Bohn v. Fyfe.

Execution—Orders for payment out of money to an execution creditor.

An execution creditor, with writs in the Sheriff's hands, is entitled to an order for payment of any fund out of court standing to the credit of the debtor, in satisfaction of his judgment and costs.

[Mr. Stephens—Oct. 15, 1878.

This was an administration suit. The report of the Master found Hugh Gilchrist entitled to a legacy, under the will of the testator, of $275, and the decree on further directions ordered payment out of this among other claims. Several years previously one Hugh McD., had recovered judgment against Gilchrist for an amount which, with subsequent interest and costs, now exceeded the amount of the said legacy. From time to time writs had been issued upon the judgment, but it appeared that Gilchrist possessed no property whatever, except the said legacy. A writ of *fi. fa.*, against goods was now in full force in the hands of the Sheriff of York. A stop order was obtained Oct. 2, 1878.

Seton Gordon moved on petition for payment out of the legacy in satisfaction *pro tanto* of the judgment. He submitted that an execution creditor, with writs in the Sheriff's hands is entitled to an order for payment out of any fund in court standing to the credit of the debtor, in satisfaction of his judgment and costs: but the sanction of the court was asked lest otherwise a contempt might be construed and the seizure nullified: *Ex parte Reece*, 16 Law

Times, 501; *Courtoy* v. *Vincent*, 15 Beav. 486; *Wilson* v. *McCarthy*, 7 Prac. R., 132; *Robinson* v. *Wood*, 5 Beav. 388.

Armour, for Gilchrist. Until a cheque is actually made out, the interest of Gilchrist is a mere chose in action, which is not liable to execution: *Quarman* v. *Williams*, 5 Beav. 133; *Wood* v. *Vincent*, 4 Beav. 419. There is no precedent for the order asked.

The Referee held that he was at liberty to take the simpler course and order payment out to the petitioner directly, inasmuch as, if it were necessary, he could direct the cheque to be forthwith made out, in which case it was admitted the Sheriff could seize.

Order granted.

Varden v. Varden.

Examination of opposite party—R. S. O., c. 62, sec. 18—C. S. U. C., c. 32, sec. 15—C. S. C., c. 79, sec. 4.

Held, that R. S. O. cap. 62, sec. 18 does not authorize calling the opposite party as a witness, *except only at the hearing or trial.*

[Mr. Stephens, Nov. 9—Proudfoot, V.C., Dec. 2, 1878.

In this case the plaintiff had given eight days' notice to the defendant's solicitors, pursuant to R. S. O., cap. 62, sec. 18, of his intention to cross-examine the defendant upon her answer. She, however, failed to appear.

H. Cassels now applied to the Referee for an order to take the answer off the files, and to note the bill *pro confesso* against her under the provisions of R. S. O., cap. 62, sec. 18. He cited *Moffatt* v. *Prentice*, 6 Prac. R. 33, and urged that the statute rendered it unnecessary to personally serve the subpœna. He also cited *McMurray* v. *G. T. Ry. Co.*, 3 Chy. Ch. 130.

Hoyles contra, urged that the statute did not apply, inasmuch as it only speaks of calling the opposite party as a witness *at the hearing on trial*, and that *Moffatt* v. *Prentice* was not in point. He referred to *Sefton* v. *Lundy*, 4 Chy. Ch. 33. The subpœna must be personally served before punishment can be awarded.

Cassels, in reply: *Sefton* v. *Lundy* does not apply.

The Referee: I think the application under the wording of the statute is intended to be made to the Court at the hearing.

Application dismissed, without costs.

On appeal Proudfoot, V. C., held that the language of the statute was quite clear, and continued: "But it was contended that in this section the Revised Statute only consolidated the previous Act C. S. U. C., c. 32, sec. 15; and that in *McMurray* v. *G. T. R.*, 3 Chy. Ch. 130, it was assumed that this applied to such an examination. This Act, C. S. U. C., cap. 32, sec. 15, however, is general in its terms, and contains no such limitation of the examination to the hearing or trial, as in the Rev. Stat., and it might very well bear the construction assumed in the case cited, and yet give no countenance to this application. The Rev. Stat. indeed refers to the other as its original, but the revisers were not confined to mere consolidation, or at all events, these variations have been sanctioned by Parliament (41 Vic., c. 6, Ont.)" As to the argument that the construction placed on the C. S. C., cap. 79, sec. 4, in *Moffatt* v. *Prentice*, 6 Prac. R. 33, was an authority for the present application, the learned Vice Chancellor held that that statute empowered the judge to compel the attendance at *any* examination of witnesses, but that this is not the case with R.S.O., cap. 62, sec. 18.

Appeal dismissed with costs.

London and Can. L. and A. Co. v. Pulford.

Costs—Deposit on sale by subsequent incumbrancer—G. O. 429, 456.

Where, under G. O. 456, a subsequent incumbrancer had demanded a sale and paid $80 into court as deposit; *held*, he could not, after the expenses of the sale had been incurred, be called on to pay any more, although the actual costs were taxed at $165. *Semble*, the plaintiff should

have objected to the deposit as insufficient when the precipe order for sale was obtained.

[Mr. Stephens, Oct. 19.—Proudfoot, V. C., Dec. 2.

In this case Molson's Bank, a subsequent incumbrancer, had demanded a sale under G. O. 456 and had deposited $80 in court. The costs of the sale, which proved abortive, were taxed at $165.

Arnoldi applied for an order on the Bank to pay the difference between the amount of the deposit and the taxed costs. He urged that in equity the Bank ought to pay the deficiency, and referred to the analogy of payment of $40 deposit for rehearing and the bond for $400 as security in case of appeal (R. S. O. c. 38, sec. 26); in each of these cases the appellant paid the whole amount of costs without regard to the deposit or penalty. The General Orders do not fix the deposit at $80. The schedule endorsement for the bill shows the intention of the deposit to be to cover all costs of a sale. The order was *ex parte*. In England the deposit is settled in the presence of both parties, hence this application cannot arise there, and the English cases show it must be sufficient to cover all costs: *Bellamy* v. *Cockle*, 18 Jur. 465; *Whitfield* v. *Roberts*, 5 Jur. N. S. 113; Dan. 4 Ed. 1167. The granting a sale at all in a foreclosure case is an indulgence and the party must pay for it. He also referred to *Goodall* v. *Burrows*, 7 Gr. 449; *Taylor* v. *Walker*, 8 Chy. 506, Chy. Orders 429, 456.

Hoyles, contra, urged there was no equity in the case, and that although there were no reported cases on the subject, yet the contrary practice had long been established. At any rate the application is too late, plaintiffs having acquiesced in the order. Had a larger deposit been demanded the Molson's Bank might not have been willing to go to such expense. The case of *Corsellis* v. *Patman*, L. R. 4 Eq. 156, shows that no order can be made such as asked.

The Referee dismissed the application on the ground that the order had been acquiesced in by the plaintiffs, and that there was no equity to compel the defendants to pay more than they had been required to pay under the General Orders, and the practice of the court thereunder, after al the expenses had been incurred, and when it was too late to determine whether they would be willing to incur the additional liability or not.

Application dismissed.

On appeal, Proudfoot, V. C., held: It was not possible to read the orders of the Court in such a way as to justify the order applied for, though he regretted that such was the case. Under G. O. 429 the deposit is to be "a reasonable sum fixed by the court," and "the necessary deposit" under G. O. 456 must refer to such reasonable sum, but neither order determined the amount of the deposit. But Sched. S, required to be endorsed on the bill under G. O. 456, contains a notice to the defendants, that if they desire a sale they are to deposit a sum of $80 to meet the expenses of such sale. He continued:—"That is the only place where the amount appears. The proper defendants to such a bill are the owners of the equity of redemption, and this notice therefore is intended for, and according to the practice need only reach, them, for the notice T, to be served upon subsequent incumbrancers, made parties in the M.O., contains no mention of any deposit. When a subsequent incumbrancer, therefore, desires to obtain a sale and makes a deposit for the purpose, he must run the risk of paying in enough; for if he does not pay in a sufficient sum, reasonable in the opinion of the court or a judge, I have no doubt that the order for a sale obtained upon *præcipe* would be discharged. Whether the same could be varied in the case of a sale desired by an owner of the equity of redemption, or whether he would be liable for the additional expenses, I need not now inquire, for this is the case of a subsequent incumbrancer, and there are considerations applying to the owner that do not apply to the subsequent incumbrancer. Nor need I inquire whether the language in the endorsement, "to meet the expenses of such sale," could be construed so as to imply an undertaking to pay what was necessary to meet such expenses beyond the $80, for I do not think that notice applies to a subsequent incumbrancer. And when the plaintiff was content to allow the sale to go on with the deposit of only $80, it would not be fair to the defendants to im-

pose a larger liability upon them now than they thought they were incurring. Had the plaintiff objected to the deposit, they would have had an opportunity of considering whether the chance of getting more than enough to liquidate prior incumbrances was probable enough to justify the hazard of a larger sum, and no objection having been made, they had reason to assume that no greater risk than the $80 was incurred.

*Appeal dismissed with costs.**

London and Can. L. and A. Co. v. Morrison.

Costs—Deposit on sale by subsequent incumbrancer —G. O. 429, 456.

Under similar circumstances as those in the last case, an application was made for an increased deposit immediately after the settlement of the advertisement; *held:* application made too late. *Semble,* incumbrancer might be compelled to increase deposit, or have no sale, if called on promptly to do so.

[Mr. Stephens, Dec. 17, 1878.—Blake, V. C., Jan. 13, 1879.

This case, following close upon the case of the same Company v. Pulford, confirmed the decision therein, and carried still further the principle on which that decision proceeded.

The dates of the proceedings in this case, from the decree onwards, were :—

Decree for foreclosure, Jan., 1878.

Deposit and order for sale, May 3, 1878.

Master's report, May 13, 1878.

Final order for sale, Nov. 12, 1878.

Letter from plaintiffs' solicitor, asking for increase of deposit, Dec. 12, 1878.

Refusal of subsequent incumbrancer to increase the same, Dec. 13, 1878.

Advertisement of sale settled a few days prior to the notice of this motion, which was served Dec. 14, 1878.

Arnoldi now moved for an order for payment into Court by the subsequent incumbrancer of a larger sum than the $80 already deposited. He used similar arguments and referred to the same authorities as in the late case against Pulford, and dwelt upon the judgment of the Vice-Chancellor therein. He proved that the costs of the sale would be more than $120. The plaintiff could not prove to the Court what the expenses of the sale would be until the directions for advertising were given. It could not be said that the plaintiff should have given the conduct of the sale to the defendant: *Taylor* v. *Walter*, 8 Gr. 506. The amount of $80 was settled long ago, under the old tariff, when the amount was probably sufficient. He was not asking to vary the order, but only to increase the security. He asked that, in default of payment of the increased deposit, the order for sale should be vacated and the property foreclosed.

Kingston, contra, read G. O. 429 and 456. Until G. O. 456 and F. O. S. were set aside the application could not be granted. The proper time for taking the objection was when the order for sale was granted, and before the defendant had been put to expense under it; as it was, the plaintiff had acted on the order, and had taken out F. O. S. and settled advertisement. The plaintiffs might have given the conduct of the sale to the defendants.

The Referee held that if such an order could be made at all, it ought to be made earlier—that is, as soon as the order for sale had been obtained, and before the incumbrancer had incurred expense. He, however, referred the point to the Judge, as it was averred to have been already decided the contrary way by Vice-Chancellor Proudfoot in the case against Pulford.

On reference to him, Blake, V.C., dwelt on the injustice of calling on the subsequent incumbrancer to pay in a larger deposit, after he had incurred expense and was helpless. He continued: "I will follow *London and Can. L. and A. Co.* v. *Pulford*, decided by V. C. Proudfoot, in holding that the deposit is the price paid by the subsequent incumbrancer for a sale. The plaintiffs cannot, after so long a time, and after taking the proceedings for sale taken in this place, apply for an increase in the deposit. They cannot approbate and reprobate the order for sale. They should have said promptly to the incumbrancer, 'You may withdraw the deposit and have no sale,

* This case stands for appeal.—Rep.

or you must pay in sufficient to meet the costs of the sale.' I cannot see that this has been done. The application must be dismissed."

Application dismissed.

N. BRUNSWICK REPORTS.

NOTES OF CASES.

SUPREME COURT OF NEW BRUNSWICK.

From reports by William Pugsley, B.C.L., *and* Geo W. Burbidge, A.M., *Barristers at Law. (Vol. II. No. 2.)*

Action against Servant of Crown.

Staying Proceedings—Trespass—Where defendant committed alleged trespass as Superintendent of Government Railways.

Defendant was sued for trespass to land, claimed to belong to plaintiff, but which had been taken and used for the Intercolonial Railway. Defendant was Superintendent of Government Railways, and an application was made for a stay of proceedings on an affidavit alleging that the alleged trespass was committed by him in the employ of the Government as such superintendent, and not otherwise. Plaintiff in answer swore that the action was brought against the defendant for personally trespassing on his land, and denied that the land had been legally taken by the Government.

Held, per Allen, C.J., and Fisher and Wetmore, J.J., Weldon, J., dissenting, that the Court ought not, on a summary application, to stay the proceedings, but should leave the defendant to resist the action by plea in the ordinary way. *Milner* v. *Brydges*, 113.

Contract by Government Official.

Intercolonial Railway Commissioners—Personal liability—Where contract verbal—Whether should be submitted to jury.

Defendant was one of the Commissioners for the construction of the Intercolonial Railway, appointed by the Governor-General. Plaintiff had a contract with the Commissioners to grade the station grounds at M., according to a certain plan and specification. While plaintiff was performing his contract, defendant directed him to fill up a cellar where he was working, and upon the railway grounds, which required attending to at once, and was not included in plaintiff's contract. Plaintiff stated that he would do the work if defendant would pay him, and defendant stated that he would, and told him to do the work immediately. On being applied to afterwards for the pay, defendant told plaintiff he would see the Engineer in charge and have the amount put in the estimates, to be, paid by the Government. The amount however, not being paid, plaintiff sued defendant, personally, and was nonsuited.

Held, on motion to set aside the nonsuit, per Duff, J., that, as in the case of contracts with public agents, the presumption is that the public faith or the justice of the Crown is relied upon, and the work in question was done for the public, and defendant in ordering it done was acting within the scope of his authority as a Railway Commissioner, he did not incur any personal liability, and that the nonsuit was therefore right; but per Fisher, J., that, as the contract was entirely verbal, it should have been left to the jury to determine, under the direction of the Judge as to the relationship of the parties, whether the defendant had personally contracted and agreed to pay for the work. *Sumner* v. *Chandler*, 177.

Conveyance.

After acquired property—Does not pass—Remedy in equity—Statute—Construction of—Merchant Shipping Act—Ferry-boats.

At law, a bill of sale or conveyance cannot pass the property in goods which are not in existence or which do not belong to the grantor at the time the deed is given; though in equity such a contract would operate to transfer to the vendee the beneficial interest in the property as soon as it was acquired by the grantor, and the grantee might enforce specific performance of the contract.

The Legislature may authorize after acquired property to be transferred, but inasmuch as such a mode of conveyance would conflict with the rule of law "that a man cannot grant or charge that which he hath not," it would require very clear and unambiguous words in the Act to show that such was the intention.

An incorporated company has no power to change its corporate name without the authority of the Legislature. Where property was conveyed to a company under the name by which it was afterwards incorporated, but which had no legal existence at the time, it was held that nothing passed by the conveyance.

The title to ferry-boats running in the harbour of Saint John, must be transferred according to the provisions of the Merchant Shipping Act. *Lloyd* v. *E. & N. A. Railway Co.*, 104.

Criminal Law.

Power of the Crown to enter nol. pros.—Second indictment for same offence—Where bill contains two counts, each a separate indictment.

The prisoner was convicted of receiving stolen goods, on an indictment containing two counts, one for stealing the goods, and the other for receiving them, knowing them to have been stolen.

The prisoner had, on a former day in the same Circuit, been indicted for stealing the same goods as those which he was charged with stealing by the first count of the present indictment. A jury was impanelled and the trial of the prisoner begun; but in consequence of it appearing from the testimony that the prisoner could not be convicted for larceny, the Clerk of the Crown, who was conducting the prosecution by direction of the Attorney-General, entered a *nolle prosequi*, and then sent another bill before the Grand Jury, containing a count for receiving, the indictment on which the conviction took place, and on the trial he consented that the prisoner should be acquitted of the charge of stealing alleged in the first count, and he was acquitted accordingly:—

Held, on a case reserved,

1. That the Clerk of the Crown has authority to enter a *nolle prosequi*.

2. That a *nol. pros.* being entered the prisoner could again be indicted for the same offence.

3. Even admitting that the Clerk of the Crown has no authority to enter a *nol. pros.* the conviction upon the count for receiving would be good, each count being a separate indictment in itself. *Regina* v. *Thornton*, 140.

Fire Insurance.

Plaintiff must have insurable interest—Where plaintiff has made advances to build vessel but no transfer made.

Plaintiff, in 1872, commenced supplying B. with advances for building a vessel, under a verbal arrangement that he was to supply B. to build the vessel, and hold her as security for his advances. He was to dispose of her in shares, or in the whole, as he saw proper, and when the vessel was disposed of, whatever was remaining after he got his pay, was to go to B. When she was well advanced, in August 1874, plaintiff effected insurance on her in his own name. He, however, never had possession of the vessel, nor held any bill of sale or transfer of her.

Held, in an action on the policy, that plaintiff had no insurable interest, and could not recover. *Clarke* v. *Scottish Imperial Insurance Co.*, 240.

Insolvent Act of 1869.

Fraudulent preference—Where mortgage given five months before issue of attachment—Burthen of proof.

Where a mortgage to secure an antecedent debt was given by a trader more than five months before the issue against him of a writ of attachment under the Insolvent Act of 1869, the Court held that, as the burden of proving that the mortgage was given in contemplation of insolvency was upon the assignee of the estate, in which he had wholly failed, and as fraud was not to be presumed unless the conveyance was made within thirty days of the issuing of

the attachment, the mortgage was therefore not void under sec. 89 of the Act, as being a fraudulent preference. *Ex parte Jones; In re Raymond*, 136.

Discharge—Where insolvent has not kept a cash book.

A trader who does not keep a cash book is not entitled to a discharge under the Insolvent Act of 1875. *Gilbert* v. *Girouard*, 148.

Fraud.

Where charged in action against insolvent—Judgment by default—How to proceed next.

In an action brought by plaintiff against defendant (an insolvent), the declaration charged defendant with fraud under section 136 of the Insolvent Act of 1875, and, interlocutory judgment having been signed, a motion was made for an order for a writ of enquiry to issue to assess the damages, and for the Court to pronounce judgment on the fraud; but, *Held*, that the Court had no authority to make any such order.

Quære, as to what is the proper course to pursue in such a case. *Moss* v. *Kirkpatrick*, 220.

Replevin.

Pleading—Estoppel.

In replevin plaintiff may shew, the same as he might in trover—that defendant by his acts is estopped from denying that the property in question is the plaintiff's, and if the alleged estoppel is *in pais*, it may be relied on in evidence without being pleaded.

A mere representation of a fact will not amount to an estoppel unless it was made with the intention of inducing another party to act upon it, and he does act upon it and alter his position. *Hegan* v. *Fredericton Boom Company*, 105.

Trespass.

Forcible entry by owner—Whether has right to eject by force a person whose possession was originally lawful, but who continues in, having no longer right to do so.

Where the defendant was the owner, and entitled to the immediate possession of a dwelling house, occupied by the plaintiff's wife, who detained it, after demand, by refusing to give it up and locking the doors against the defendant's entry; *Held*, by a majority of the Court, (Allen, C. J., Fisher and Wetmore, J.J., Weldon and Duff, J.J, dissenting) that the defendant was justified in forcing open the door, so locked—entering and taking possession of the house, and had thereby obtained such a lawful possession of it, as proved the allegation in his plea of justification, viz.: "that he was in possession of the dwelling house." *Napier* v. *Ferguson*, 255.

LAW STUDENTS' DEPARTMENT.

First Intermediate Examination: Michaelmas Term, 1878.

Smith's Manual of Equity—Act Respecting the Court of Chancery.

1. In what case has the Court power to decree alimony?

2. Under what circumstances has the Court jurisdiction to relieve against a forfeiture for breach of a covenant to insure?

3. Describe the procedure by which issues in Chancery proceedings may be tried by a jury.

4. Define *accident*, and give an example in which Equity would grant relief.

5. In what cases will the Court relieve against the defective execution of a power? What is the essential distinction between a defective and a non-execution of a power?

6. Explain the application of the maxim, *Ignorantia legis non excusat.*

7. What was the distinction in regard to the effect of joining in receipts between Executors and Trustees?

Second Intermediate Examination: Michaelmas Term, 1878.

Broom's Common Law—A. J. Acts, &c.

1. An attorney is retained to sue John Smith, and by mistake sues the wrong man, and puts the latter to the expense and trouble of a defence. Would the person sued have any remedy against the attorney, and why?

2. Illustrate and explain the rule, that "the law gives no private remedy for anything but a private wrong."

3. What is the general rule as to the liability of executors for the covenants and contracts of the testator (*a*) broken in his lifetime, (*b*) broken after his death?

4. "Covenants when viewed in relation to each other will be found to be divisible into three classes—independent, dependent, and concurrent." Explain and distinguish these classes of covenants.

5. Give the substance of the 17th section of the Statute of Frauds.

6. What provision is made for the trial of County Court cases at the sittings of Assize and Nisi Prius?

7. A cause in a Common Law Court is referred by the presiding Judge at Nisi Prius to the Master in Chancery to take the accounts, and the Master has made his report. What proceedings are then necessary, and what provisions are made for an appeal from the Master's report?

Certificate of Fitness: Michaelmas Term, 1878.

Leith's Blackstone—Taylor on Titles—Statutes.

1. An intestate in his lifetime gave lands to one of his children. Is that child entitled to share equally with the others in lands of which the intestate died seized? Explain fully.

2. A, being seized of a paternal estate, executed a conveyance by which he granted to B an estate for life, with remainder to himself and his heirs. He died intestate without issue, and leaving no brothers or sisters. In what manner would his estate descend under the three periods? Give the effect of any statutory enactment which applies to the circumstances, and the reasons for your answers.

3. How do you reconcile the rule in Shelley's case with the usual provisions of a marriage settlement in which an estate is given to the grantor for life, with the remainder to his intended wife for life, and remainder to any child or children of the marriage in fee. What estate has the grantor?

4. State the effect of Provincial Statutes as to escheat or forfeiture in cases of attainder.

5. State shortly the effect of the Statute of Mortmain, of 9 Geo. II., and of any Provincial statutory modification of it.

6. Is it necessary to the validity of a conveyance by lease and release that the grantee should take actual possession of the lands granted? Explain fully.

7. A tenant in common brings an action of ejectment against his co-tenant, who does not dispute his title. What course should be pursued in order that the defendant may be entitled to the costs of the action?

8. What is the effect of the statutory provision as to the relative positions of landlord and tenant, and the mortgagees of the tenant after judgment in ejectment for forfeiture or non-payment of rent?

9. Is there any, and if so what, necessity for the registration of a deed of bargain and sale?

10. A solicitor takes a conveyance of land from his client, and agrees for the sale of it to a purchaser. The purchaser refuses to take the title on the ground of the fiduciary relationship. Is this a *marketable title?* Explain the meaning of that term.

Certificate of Fitness: Michaelmas Term, 1878.

Smith's Mercantile Law—Common Law Pleading and Practice.

1. What differences are noted by Mr. Smith between a principal's rights against a remunerated and against an unremunerated agent?

2. What effect has payment on the negotiability of a bill of exchange? Explain your answer fully.

3. Define *affreightment by charter party.* What is meant by conveyance of goods by general ship? Mention some of the chief incidents of these two kinds of contracts of affreightment.

4. What is meant by "stranding" of a vessel in reference to marine insurance. State how it arises that an accurate definition of this word became very important in connection with marine insurance.

5. A makes a wager of $1,000 with B that a particular individual will win a race, and loses. A is unable to pay the money at once, but promises to pay it in future, and B takes out a policy of life insurance on the life of A for $1,000 to secure the debt, and A dies before payment of the debt. Can B recover on the policy? What would have been the effect if the debt had been paid? State fully the grounds and principles on which your answers depend.

6. What are the provisions of the fourth section of the Statute of Frauds in respect to guaranties? How was the intention of the Statute in this respect evaded, and what remedy was afterwards provided for such evasion?

7. A agrees in writing to sell to B certain specific goods on six months' credit. Can B insist on immediate delivery of the goods? Would it make any difference if the agreement was for payment by note at six months? What would be the effect of the insolvency of B before delivery of the goods in each of these cases? State the principles involved in your answers.

8. What is the effect of a bill of lading in the hands of an endorsee for value as evidence against the signer? Answer fully, giving reasons.

9. Under what circumstances and subject to what limitations can a transfer by way of endorsement of a warehouse receipt be taken as security for debt?

10. What statutory powers of dealing with goods have been conferred on an agent entrusted with the possession of them?

For Call—Michaelmas Term: 1878.

Stephen on Pleading—Byles on Bills—Common Law [Pleaidng, and Practice, and the Statute Law.

1. What was the original method of commencing an action of replevin and how it is now commenced? State fully the statutory provisions involved in your answer.

2. In an action on a bond the plaintiff declares that at the time of the sealing and delivery the defendant was of full age, would it be good pleading to traverse this allegation? Give the reason for your answer, state the general rule on which your answer depends, and draw the plea as it ought to be, the action being in the Queen's Bench, A *v.* B.

3. State and exemplify the rule as to pleadings with respect to acts valid at common law, but regulated as to the mode of performance of them by statute.

4. In an action of assumpsit for work and labour done the defendant pleads that the work was done under a contract that no remuneration should be claimed except for money out of pocket, and also in another plea that the work was done under a contract that no remuneration should be claimed if the work should turn out to be useless, and that it had done so. State any faults you can discover in these pleas, and the plaintiff's remedy, with special reference to any general rules of pleading which may be involved in your answer.

5. What provisions have been made in regard to seizure of promissory notes and bills of exchange under *fi. fa.* goods? Answer fully.

6. What difference is there in respect to the burthen of proof between the position of a holder without value and a holder with notice? Answer fully.

7. A is indebted to B in a sum of $200. A comes to B with some bills and notes, and leaves them with him, with directions to collect them and apply the proceeds in payment of a debt due from A to C. B. takes the bills and notes, collects them, and has sufficient proceeds to pay off the debt to C, but retains 200 dollars in his own hands, and refuses to pay C. What is the legal position of A and B in regard to the transaction? Answer fully, referring to any Statute which may incidentally be introduced in discussion of the question.

8. A foreign Bill of Exchange is made in three parts, and A, B, and C, become respectively *bona fide* holders of the first, second, and third parts respectively. Which of these holders would be entitled to the bill, and what remedies would they have as between themselves?

9. A witness resides in the Province of Quebec. What methods are provided of obtaining his evidence? State fully the various steps to be taken as to these methods.

10. State shortly the various steps necessary to be taken where an appeal is to be had from a County Court.

Lewis's Equity Pleading—Taylor's Equity Pleading and Practice.

1. What are the various kinds of demurrers? Can there be a demurrer in any case if the plaintiff is entitled to some of the relief that he has prayed?

2. What is the rule as to the plaintiff's right to ask alternative relief in his bill? Give an example in which it might be prayed, and one in which it could not.

3. Apply the rule that all persons interested in the subject matter must be parties to a bill, giving one case in which a demurrer would be allowed and one in which it would be overruled.

4. If an answer neither traverses nor confesses, and avoids the statements in the bill, what is the plaintiff's course.

5. The rights of A and B depend upon the sanity or insanity of a testator. A compromise is effected. A afterwards files a bill against B to avoid the compromise on the ground that the latter "knew the testator was sane." Is this bill open to objection?

6. What is the real objection to a bill which alleges that "one of the defendants alleges, and the plaintiff believes," some material fact?

7. What is a supplemental statement, and when and how may it be filed?

8. Mention the grounds upon which the Court will decree the dissolution of a partnership. Is incompatibility of temper a ground?

9. Previous to his marriage, A covenanted to pay his intended wife a sum of money at a certain time. He died intestate, without having paid anything, and his widow became entitled to a share of his personalty. Can she recover, in addition to her distri-

butive share, the amount agreed to be paid her? Explain.

10. After making his will, A becomes indebted to B, to whom he had, by his will, bequeathed a sum of money. He dies so indebted. Can B recover both debt and legacy? What is the principle upon which the Court acts? In what way does the Court lean in deciding upon analogous points?

Blackstone Vol. I—Smith on Contracts, and Best on Evidence.

1. Define after Blackstone, "Municipal Law," and explain its several properties as they arise out of his definition.

2. State the duty of a privy councillor of England as defined by Blackstone and the power possessed by the privy council.

3. What are the disabilities and privileges of infancy as stated by Blackstone?

4. In how far is parol evidence admissible to annex customary incidents to written contracts?

5. A Toronto merchant goes to Buffalo and purchases on credit a large quantity of brandy from a Buffalo merchant, for the avowed purpose of smuggling it into Canada, which is actually done, and the Buffalo merchant commences an action for the price here. State fully the circumstances on which his success will depend, and the general rule illustrated by this case.

6. State the law in regard to the power of a wife to bind her husband by contracting with third parties.

7. State the principal securities for the truth of evidence noticed by Mr. Best.

8. What statutory provision is there by which evidence of a witness can be given in criminal cases without the presence of a witness in Court? Answer fully, showing the circumstances under which such evidence is admissible or inadmissible, and compare the law in that respect with the law in civil cases.

9. Discuss, after Mr. Best, the advantages of direct over presumptive evidence, and the advantages of presumptive over direct evidence.

10. Explain and illustrate the rule, that *there must be clear and unequivocal proof of the corpus delicti.*

Dart—Walkem—Statute Law.

1. Upon what ground does the jurisdiction of the Court of Chancery to sell real estate of infants depend? What expedients were sometimes resorted to in order to create jurisdiction?

2. In a will there is a bequest of the residue of personalty to be divieed among testator's relations "mentioned in this my will." By a codicil, the testator gave legacies to two relatives who were not mentioned in his will, and directed that the codicil should be taken as part of his will. By a second codicil, he gave legacies to two additional relatives, but made no direction as to the first codicil. Who are entitled to share in the residue? Give your reasons.

3. What were, and what are now the rules as to the operation of wills upon after-acquired personalty and realty?

4. What power had a married woman prior to the Con. Stat to devise or bequeath by will? Detail particularly the nature and requisites of such a will. Give some reasons for the opinion that this power no longer exists.

5. Distinguish between separate real property of a married woman under the doctrine of the Court of Chancery, under the Married Women's Acts in the Consolidated Statutes, and under the more recent statutes.

6. A testator by his will directs his debts to be paid. Has the executor, under any circumstances, the power to sell the realty in case the personalty is insufficient to pay the debts? Give your reasons.

7. What do you understand by an estate passing by estoppel? Is there any difference as to estoppel between a conveyance by grant, and a conveyance by lease and release? Explain.

8. State shortly the effect of Locke King's Act.

9. What interests in land are now saleable under execution.

10. In taking proceedings for the partition of real estate, it appears that one of the parties interested has not been heard of for a long period, and it is uncertain whether he is alive or dead, what course would you adopt?

CORRESPONDENCE.

County Court Appeals—County Courts and Quarter Sessions.

To the Editor of The Law Journal:

Sir,—Spare me space in your paper to call attention to a couple of legal matters.

(1.) Could not Mr. Mowat be induced, at the next Session of the Legislature, to amend the practice respecting County Court appeals. At present it is about as expensive as an appeal to the Supreme Court.

Either do away with the right of appeal, or give a simple and inexpensive remedy. Why should not these appeals be heard by one Judge of Appeal instead of the full Court, as Insolvency appeals are now disposed of? This would save the time of the Court. The papers could be certified, and on a simple notice and deposit, as in appeals from a single Judge to the Court in Banc., the case could be re-argued at any time. The opinion of one Judge of the Court of Appeal would, in almost every case, be perfectly satisfactory to the parties interested. This would reduce the expense and trouble to something like commensurate with the amount usually involved.

(2.) Should not the Sessions and County Court be held quarterly as formerly in the country? When the late Sandfield Macdonald passed the Act doing away with the March and September sittings he provided that County Court cases could be tried at the Assizes. This provision has practically been done away with, no doubt for excellent reasons. But it is a hardship on a man now who has a contested case, and when a jury is required, to have to wait six months. I think there is a strong feeling too, that many of the criminal cases so silently disposed of at the Interim Sessions and Police Courts should be tried at some Court having a better class and larger number of people attending it, than usually graces the Interim Sessions or Police Court.

(3.) At present the Sessions have no jurisdiction to try forgery or perjury, though they can try more important cases. Surely there is no reason now in the reason for this limitation.

Yours, &c.,

Country Practitioner.

REVIEWS.

A Treatise on the Law of Judicial and Execution Sales. By David Borer, of the Iowa Bar. Second edition. Chicago: Callaghan & Company. 1878. R. Carswell, Toronto.

This edition has been nearly doubled in size since the first edition, and re-arranged. We can well think that it deserves the good reception it has met with in the United States. As however, the authorities cited are almost entirely from the reports of that country, and as these necessarily depend upon legislation somewhat different from ours, the book will not be of the great practical use in this country that it certainly must be across the border. The arrangement of the subjects seems to be very good, and the diligence and learning of the author cannot but be considerable, when we consider that he had but little to help him in the way of previous works on the same subject.

An English Version of Legal Maxims; with the original forms. By James Appleton Morgan A.M., author of the Law of Literature, &c. Cincinnati: Robert Clark & Co. 1878.

This is, we suppose, the largest collection of Legal Maxims ever attempted, aad as they are alphabetically arranged, and the book supplemented by an Index (which by the way might be fuller), it will be a useful addition to a library and for occasional reference. We are inclined to think it would be well for students to become more familiar with them, and to impress them upon their minds for reference in after years. We cannot therefore agree with a contemporary that does not appreciate the *raison d'être* of its publication. The collection contains 2882 maxims culled from various sources; we certainly admit our utter ignorance until now, that there were so many in existence. This book does not pretend to be more than a compilation, but it is a very perfect one, and we should not expect anything else from the author of the "Law of Literature."

A Manual of the Practice of the Supreme Court of Judicature in the Queen's Bench, Common Pleas, Exchequer and Chancery Divisions. Intended for the use of students. By John Indermaur. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1878.

Everything that Mr. Indermaur presents to the public is worthy not only of general notice but of attentive perusal by

those for whose use it is intended. His books are essentially practical; but, for this very reason the one before us is of no present use in this country, though interesting to all who may wish to know the practical working of the English Courts as at present established. The work is of an elementary character, but complete so far as it goes. The time may soon come when this and kindred works will be more sought after in this Province.

FLOTSAM AND JETSAM.

Husbands Beware.—Mr. Justice Fry has added a new terror to matrimony. A lady who was left executrix under a will had in hand upwards of £400 invested in Consols. In that condition of things she married; and after her marriage, and without disclosing her state of coverture, and without the knowledge of her husband, she sold out of the Funds and spent the money. After this she died, and then an action was brought to compel her innocent husband to refund the money. Thereupon Mr. Justice Fry ordered payment by the husband, with interest at the rate of 4 per cent. from the death of the wife. At common law no liability attached to the husband after the wife's death, but in equity the liability survived. In the face of this judgment it becomes necessary for intending husbands to make diligent inquiries, and, perhaps, to administer full and searching interrogatories to their intended brides. From the days of Benedict to those of Thistlethwaite and Nunn, the perils and dangers of the married state have been very great. But this case of *Stewart* v. *Stewart*, reveals a pit more dreadful than any of those into which those unlucky men fell. Perhaps in future marriage settlements the lady will be called upon to find a trustee to enter into a covenant to hold the husband indemnified against a call of this character.

Compulsory Liquidation in Quebec.—We inserted last week a note of a decision in the case of *Anderson* v. *Gervais*, in which the Court held that it had no jurisdiction to permit a trader, against whom a writ of compulsory liquidation had issued, to continue his trade while the contestation of the attachment was pending. This decision was opposed to one rendered in 1876, in *Fisher* v. *Malo*, Bainville, J., in which it was held that the Judge may, under special circumstances, permit the insolvent to continue his trade. In that case the writ of compulsory liquidation had been quashed, but an appeal had been taken from the judgment. The Court held that the judgment had the effect of giving back to the trader the possession of his effects, and he was allowed to continue his trade while the case was pending in review. This decision has been followed by the Court of Review in *Anderson* v. *Gervais*, the decision noted last week being reversed. The Court of Review holds that a trader may be allowed to continue his business, pending proceedings to set aside a writ of compulsory liquidation, on giving security to the full value of his stock. —*Legal News.*

An Intricate Question, Logically Decided. —Four men in India, partners in business, bought several bales of Indian rugs, and also some cotton bales. That the rats might not destroy the cotton, they purchased a cat. They agreed that each of the four should own a particular part of the cat; and each adorned with beads and other ornaments the leg thus apportioned to him. The cat, by an accident, injured one of her legs. The owner of that member wound around it a bag soaked in oil. The cat, going too near the hearth, set this rag on fire, and being in great pain, rushed in among the cotton bales, where she was accustomed to hunt rats. The cotton and rugs thereby took fire, and they were burned up—a total loss. The three other partners brought a suit to recover the value of the goods destroyed against the fourth partner, who owned this particular leg of the cat. The Judge examined the case, and decided thus:—"The leg that had the oiled rag on it was hurt: the cat could not use that leg; in fact, it held up that leg, and ran with the other three legs. The three unhurt legs, therefore, carried the fire to the cotton, and are alone culpable. The injured leg is not to be blamed. The three partners who owned the three legs with which the cat ran to the cotton will pay the whole value of the bales to the partner who was the proprietor of the injured leg."

Great Lawyers at Drill.—Ellenborough and Eldon were both turned out of the awkward squad of Lincoln's Inn corps for awkwardness. The former's attempt at this military training gave him an opportunity to utter a memorable jest. When the drill serjeant reprimanded the company for not preserving a straiter front, the great judge replied, "we are not accustomed to keeping military step, *as this indenture witnesseth.*"

General Notes.—It is related of Judge Walter T. Colquitt, an old-time justice of the Georgia Supreme Court, that he once condemned a man to be hanged, preached a sermon, reviewed the militia, married two couples at night, and then conducted a prayer meeting—all in one day.

Law Society of Upper Canada.

OSGOODE HALL,

MICHAELMAS TERM, 42ND VICTORIÆ.

During this Term, the following gentlemen were called to the Bar; namely:—

Frederick Pimlott Betts
(Who passed his examination in Trinity Term).
William Barton Northrup.
James Albert Manning Aikins.
Edmund Lindsay Dickinson.
Albert Jeffrey.
Walter Macdonald.
Duncan Denis Riordan.
William Henry Best.
Thomas Rollo Slaght.
Bartle Edward Bull.
John Ball Dow.
Robert Hodge.

And the following gentlemen were admitted as Students of the Law and Articled Clerks, namely:—

Graduates.

John Henry D. Munson.
Henry Nason.
William Johnston.
John Fravers Lewis,
Albert John Wedd McMichael.

Matriculants.

Edmund Bell.
George Kappelle.
Ferguson James Dunbar.
Edmund Sweet.
Frederick A. Munson.
Harry O. Morphy.
James C. Fraser.

Juniors.

Arthur Alexander Webb.
John Christopher Delaney.
Thomas Carr Short.
Albert Edward Barber.
W. Taylour English.
F. X. Murphy.
Thomas H. Stoddart.
John Workman Berryman.
Wilmot Churchill Livingston.
Alexander W. Ambrose.
Samuel Thomas Hamilton.
John Soper McKay.
Abner E. Decow.
Wm. John Code.
John Edward Moberly.
Edmund Weld.
John Edward Bullen.
Robert W. Witherspoon.
Chauncey G. Jarvis.
Isaac N. Monk.
Edward W. M. Flock.
John M. Best.
Alexander Darrach.
Wm. Fred D. Mercer.
Joseph Braun Fisher.

Articled Clerk.

Wm. Edwin Sheridan Knowles.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1–300; or,
Virgil, Æneid, B. II., vv. 1–317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1–300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1–300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1–300.
Virgil, Æneid, B. I., vv. 1–304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.

Museus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.

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DIARY FOR MARCH.

1. Sat ...St. David's day.
2. Sun. ..Quadragesima.
3. Mon....Treaty of San Stephano signed, 1878.
4. Tues ..Court of Appeal sits. County Court sittings for York begin.
6. Thur...York changed to Toronto, 1834,
9. Sun....2nd Sunday in Lent.
16. Sun. ..3rd Sunday in Lent.
17. Mon. ..St. Patrick's Day.
18. Tues ..Completion of Suez Canal, 1869.
19. Wed...Opening 1st Ottoman Parliament, 1877.
23. Sun....4th Sunday in Lent. Sir George Arthur, Lieut.-Gov. U. C., 1838.
25. Fri....Canada ceded to France, 1632.
29. Sat ...B. N. A. Act assented to, 1867.
30. Sun. ...5th Sunday in Lent. Lord Metcalfe, Gov.-General, 1843.

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Canada Law Journal.

Toronto, March, 1879.

The subtle leaven of Equity is pervading the Common Law Courts. A new development of the maxim which Chancery delights to honour that "Equality is Equity," may be found in the judgment on *Regina* v. *Wilson*, 43 U. C. R. 583, where it is held that "a superior person" has no exceptional privileges in this Province over the common run of litigants, so as to justify the Court in awarding a criminal information at his instance, and for his benefit.

One by one the complexities of the Mechanics' Lien Act are being solved by the judges. The Chancellor, the other day, thought that, when the contract price was payable by instalments, a bill could be filed when the first payment was due, and that application could be made in that suit to be allowed the other instalments as they fell due. He thought this a more merciful course, than requiring a bill to be filed as each payment accrued due.

A correspondent adverts to the fact that, in glancing over the earlier volumes of Grant's reports, he came across a passage which is pertinent to this day, touching the singular fatality which compels Chancery clerks to leave out dates in making up briefs. In 1855, V. C. Spragge, in *Donovan* v. *Lee*, 5 Gr. 352, is thus reported: "While alluding to these defects in this brief, I may refer to the common practice of omitting in briefs the dates of pleadings, and of the taking of depositions. The absence of these dates often leaves facts uncertain and obscure." How many times since has the same observa-

tion been made from the bench! How long will the patient judges abstain from meting out a punishment which would at once eradicate the evil—*i.e.*, direct that for all such slovenly briefs, costs be disallowed.

In a case in the St. Louis Circuit Court a few days since, defendant's counsel assailed the amended petition of plaintiff as "without backbone or bowels," and the Court sustaining the objection, plaintiff took a non-suit before the case reached the jury. Plaintiff's attorney then prayed the Court to set aside the non-suit and grant a new trial thus pathetically: "The Court erred in permitting one of the counsel for the defence to grossly abuse and stigmatize plaintiff's pleadings in the presence of the jury, the Court having good reason to believe the motive which influenced counsel so to do was for the purpose of holding plaintiff's attorney up before the jury in a ridiculous light, thereby scandalizing the proceedings and arousing the resentment of the one attacked, and diverting his mind and attention from a proper consideration of the trial."

A decision of considerable importance has recently been given by Vice-Chancellor Proudfoot in *Re Ford*, which was a case stated under the Vendor and Purchaser Act. A testator devised certain land "with power to the executors herein mentioned to sell, and invest the proceeds," the devisee to receive the interest during his life, and after his death the proceeds to be divided among the family of the testator; and in the clause appointing the executors, the words "to see my will carried into effect" were added. The Vice-Chancellor held that the effect of the will was to vest in the executors "not a bare power, but a power coupled with an interest, vested in them in the character of executors, and, therefore, attached in this will to the office of executors," and that one executor having died, the surviving executor could nevertheless make a good title to the land in the purchaser. A full report of the case will appear next month.

The publishers of the weekly *Legal News* announce that it has been found impossible to continue the publication of that journal, owing to the want of sufficient support to meet the necessary expenses. The publishers speak of a difficulty in reconciling the conflicting wishes of the different Provinces as to the manner in which the space should be occupied so as to be most useful to them. We appreciate the difficulties of their position. We have at various times been urged to do numerous things which it was thought could, should or ought to have been done in connection with this journal; but, whilst thankful for all suggestions and accepting those that were practicable, we have found that the experience of twenty years is of more value than many theories. It is impossible to please all, as our late contemporary has found to his cost. We regret the result, as the *Legal News* was managed with much ability and must have been useful to many. As we well know, the encouragement to enterprise of this kind is very limited in Canada, and the field is circumscribed. Many are willing to take advantage of the labour of others, but few care to pay for it.

The Law Society have advertised for two Reporters, one to be appointed for Common Law Chambers and one for Chancery Chambers. It is quite time that something were done in this matter. The

last arrangement has been eminently unsatisfactory, that is, if there is any necessity for practice reports at all, and we fancy there must be judging from the demand there is for numbers of this Journal, containing reports of cases published by us, without remuneration from the Society. The system adopted before the appointment of the late Practice Reporter (who, not being a bird, could not possibly be in two or three places at the same time—*vide* Boyle Roche), though slightly more expensive than the one now proposed would seem to have been preferable, inasmuch as the Society had then to deal only with one experienced person, who was responsible for the reports, and who made his own arrangements for obtaining, from time to time, with the assistance of juniors paid by him, the information required, and preparing the matter for the printer of the Society. The salaries which it is now proposed to give are not sufficiently large to induce gentlemen at all qualified for the office to accept the position, if looked at from that point of view alone. With an occasional exception, it would be a temptation only to some clerk in a large agency office, whose day is spent almost entirely at Osgoode Hall. But even the most capable students would require some experience to fill the position reasonably well; and by the time they have learned something of their duties they will, in all probability, find some opening which would compel them to give up a position which there would seem to be no sufficient inducement to retain. The Reporting Committee have not the time, and cannot be expected, either to teach new hands, or even to find them when wanted, and the work will, we fear, as a whole, be done in a more or less unsatisfactory manner; at the same time we are glad to see that the Committee are alive to the necessities of the case.

CORROBORATIVE EVIDENCE.

In English jurisprudence it is said to be a universal rule that the Court will not allow as against a person deceased any claim which is sustained only by the uncorroborated testimony of a single witness, and that an interested one: *Bottle* v. *Knocker*, 35 L. J. N. S., 547 (by Bacon, V. C.). Though this is perhaps rather a broad statement of the rule in England, yet such is unquestionably the effect of the Ontario Statute pertaining to this subject: 36 Vict. c. 10 s. 6 (*Rev. Stat.* c. 62, s. 10). The effect of this Statute is considered in *Stoddart* v. *Stoddart*, 39 U. C. R. 211, and the conclusion is reached that corroboration by material evidence is required in the case not only of an *opposite* party, but also of an *interested* party. This corroboration, however, need not be by the oral evidence of another witness confirmatory of the bargain proved by the claimant, but may be by documents, or circumstances: *Cooley* v. *Smith*, 40 U. C. R. 543. As remarked by Chatterton, V. C., in *Hartford* v. *Power*, Ir. R. 3 Eq. 607, unless there is something not necessarily of direct evidence, but of circumstances, at least, corroborating the claim, it would be most unsafe to allow it. See also *Birdsell* v. *Johnson*, 24 Gr. 202; *Findley* v. *Pedan*, 26 C. P. 483.

It is not necessary that the evidence of the party claiming should be corroborated in every particular. That would be, in the language of Sir James Hannen, equivalent to saying that no evidence needing corroboration should be used unless there were proof sufficient to dispense altogether with the evidence to be corroborated. It is enough if independent support is given to the evidence of the chief witness in so many instances that it raises in the mind the conviction that he is to be depended upon even in

these matters in which no corroboration is found elsewhere: *Sugden* v. *Lord St. Leonards*, L. R. 1 P. D. 179. This view was adopted by the Chancellor in *McDonald* v. *McKinnon*, 26 Gr. 12.

It is a question of difficulty in how far, where two persons are interested in securing benefits from the estates of a person deceased, the evidence of one is to be considered corroboratory of the case of the other. This has not been expressly decided, though it may be that the language of one of the judges in *Brown* v. *Capron*, 24 Gr. 91, is in favour of the sufficiency of such evidence. There it was considered by Burton, J., in appeal, that the evidence of the husband was to be received as sufficient to corroborate the wife, though both would have benefited by the success of the wife's contention in that case.

With regard to what is "material evidence," the views of Draper, C. J., in *Orr* v. *Orr*, 21 Gr. 409, may be referred to. He held it to mean material to the issue to be sustained by the party to be corroborated. Unless the evidence, other than his own, tends to prove the contract, it is not corroborative. Some English and Irish cases give a very liberal construction to similar language in the Imperial Statute, 32-33 Vict. c. 68. This Act provides that in case of action for breach of promise, the parties are competent to give evidence provided that no plaintiff can recover unless his or her evidence "shall be corroborated by some other material evidence in support of such promise." In *Re Bessela* v. *Stern:* the plaintiff's sister was called to corroborate the plaintiff's evidence. The sister said that she heard the plaintiff say to the defendant: "You always promised to marry me, and you don't keep your word." The defendant made no answer. In the Court of Common Pleas, it was held that this was not material evidence in support of the promise, but the Court of Appeal reversed the decision. Cockburn, C. J., said that the corroborative evidence need not go to the length of establishing the contract relied on; what the statute requires is evidence which is confirmatory of the testimony of the principal witness in regard to the contract already in evidence by her, and which makes her statement probable and credible. Bramwell, L. J., was of the like opinion, and observed (in one of the reports) that "material" was held to mean some evidence which corroborates the story of the principal witness, "and that the word gave no additional force": L. R. 2 C. P. D. 265; 37 L. T. N. S. 88; 25 W. R. 561. So corroboration in a material particular was held sufficient in *Hodges* v. *Bennett*, 5 H. & N. 625, and it was observed by Martin B. that this was in analogy to the practice as to the confirmation of the testimony of accomplices in criminal cases.

The last case on this subject is that of *Reg.* v. *Bannerman*, 43 U. C. R. 547, where the prisoner was indicted for forging a promissory note. Hagarty, C. J., there said: "I cannot believe that our Legislature, by the language used, meant corroboration by independent testimony as to every material fact." Armour, J., agreed with this view, but Cameron, J., dissented, holding that the "evidence," meaning the material fact of the case, (*i. e.*, that the prisoner had unlawfully signed the prosecutor's name to the note) must be corroborated.

It is worthy of observation that the Irish Court of Exchequer in 1872 came to the same conclusion as did the Court in England five years later. In *Hickey* v. *Campion*, Ir. R. 6 C. L. 557 (which is not cited in *Bessela* v. *Stern*), the plaintiff deposed that while attending the defendant during a sudden attack of illness in a public house, he said to her: "*Who*

has a better right to take care of me than my wife? and you know no one will now be my wife but you." She had proved that previously the defendant had promised in express terms to marry her. A witness, Neill, who was present during the illness, testified to having heard the words in italics, but did not recollect more. Pigott, C. B., who tried the case, thought there was evidence in corroboration of the promise, which should be submitted to the jury; and the Court affirmed this ruling. In the more elaborate report of this case given in 20 W. R. 752, the grounds of the decision are stated to be in effect that Neill's evidence had verified and confirmed the plaintiff's account of the conversation in question, though it will be marked that it did not verify that part of the expression which imported a promise to marry.

In connection with this subject, the case of *Cook* v. *Fearn*, 27 W. R. 212, may be noted. There, upon the sole evidence of the wife after the death of her husband, a marriage settlement was rectified in her favour, but it appeared that before the marriage the property in question had belonged to the wife.

LAW SOCIETY.

Michaelmas Term, 42nd Victoriæ.

The following is the *resumé* of the proceedings of the Benchers since Michaelmas Term, 1878, published by authority of Convocation:

Mr. D. B. Read occupied the chair in the absence of the Treasurer.

The Report of the Legal Education Committee on the case of Walter J. Read was read, and the matter was referred back to the same Committee for further report.

A communication was received and read from John M. Ladder, Esq., late Judge of the County Court of the County of Lincoln

Ordered that Mr. Lauder be informed by the Secretary that all arrears of Term fees should be paid, according to the Rules of the Society.

Mr. Hodgins, from the Special Committee appointed to confer with the Government on the subject of heating and lighting that portion of the Osgoode Hall occupied by the Courts, laid the Report of the Committee before Convocation.

Ordered that Mr. Hodgins be empowered to conclude an arrangement with the Government on the basis of the Report.

Ordered that Mr. Berthon be employed to paint the portrait of Chief Justice Wilson in the usual form.

The motion of Mr. Hector Cameron, on the subject of appointing a Committee to superintend the writing-up of the Rolls of the Society was ordered to stand over till next Term.

Mr. Cameron's notice of motion, relative to grants of money by the Society to assist in establishing Libraries in the County Towns, is again ordered to stand over till next Term.

Mr. Martin gives notice of motion to rescind the Rule at present in force enabling the Students of any University in this Province to be admitted as Students at Law or Articled Clerks, on presenting the certificate of passing an examination in the subjects prescribed by the Law Society.

Hilary Term, 42nd Victoriæ.

In the absence of the Treasurer, D. B. Read, Esq., was appointed Chairman.

The minutes of the last meeting were read and confirmed.

The Report of the Examiners for Call was received and read (the names of the gentlemen called to the Bar will appear in the usual place).

The Report of the Examiners for Certificates of Fitness was received and read, and the Certificates were issued to the following gentlemen, viz.: W. E. Perdue, T. S. Jarvis, J. Cowan, R. Hodge, G. W. Bain, E. Schoff, C. Keats, R. A. McDonald, J. G. Gordon, D. B. Dingman, P. V. Georgen, A. H. Backhouse, R. W. Shannon, W. J. Delaney, R. Strachan and A. H. Leith.

The Report of the Examiners on the Intermediate Examinations was received and adopted.

February 4th.

Mr. D. B. Read was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read and confirmed.

Mr. Meredith moved, seconded by Mr. Robertson, that the case of E. W. Scatcherd be referred to the Legal Education Committee—Carried.

The Report of the Legal Education Committee on the Petitions of R. R. Waddell and V. Chisholm was received and ordered to be taken into consideration at the next meeting of Convocation.

A cable message was received from the Treasurer, from Nice, France, in these words: "Absent until May, will telegraph resignation if Benchers wish," and read. Ordered that the Secretary acknowledge the same by letter, stating that the Benchers determined to take no action thereon.

Mr. Ernestus Crombie was elected Bencher in the place of Mr. M. C. Cameron, resigned.

Mr. Cameron's motions, as to granting money to Libraries in County Towns and as to writing up the Roll, are ordered to stand until next meeting of Convocation.

Mr. Blake's motion to amend Rule 3, of the Order of Proceedings in Convocation, was adopted by Convocation.

On motion of Mr. Irving, it was ordered that Mr. Blake be a member of the Finance Committee in the place of the Honourable M. C. Cameron, resigned.

February 8th.

In the absence of the Treasurer, Mr. Read was appointed Chairman.

The minutes of the last meeting were read and confirmed.

The Report of the Legal Education Committee on the case of E. Scatcherd was received and adopted — Ordered that Mr. Scatcherd receive a Certificate of Fitness as an Attorney.

The Report of the Legal Education Committee on the petitions of Messrs. Lennox, Perry, Quinlan, Hands and White was received and adopted.

The Report of the Committee on the Preliminary Examinations was read and approved.

The Report of the Legal Education Committee on the case of W. H. Beemer was received and ordered to be considered at the next meeting of Convocation.

The Report of the Special Committee on the case of H. Jex was received and read.

Ordered, that Mr. Jex receive a Certificate of Fitness and be called to the Bar on payment of a special fee of $200 in addition to the usual fee.

The Report of the Legal Education Committee on the petition of R. R. Waddell was considered.

Mr. Meredith moved for a special committee to enquire as to the practicability and expediency, and if found expedient and practicable to report a scheme for aiding in the establishment and maintenance of branch Libraries in County Towns. Carried, and the following gentlemen appointed a Special Committee for that purpose, viz.: Messrs. Blake, Cameron, Irving, Osler, Read, Hodgins and Meredith.

All other notices of motion to stand over until next meeting of Convocation.

Mr. Maclennan, the Chairman of the Reporting Committee, moved to continue the subscription to the Supreme Court Reports for another year—Carried.

Mr. Osler gave notice of motion for next meeting that all minutes of proceedings in Convocation, notices of motion, resolutions, orders of Convocation and reports of Committees, should hereafter be printed as soon as practicable after the end of each term, and laid before Convocation on the first day of the following Term.

February 14th.

Mr. D. B. Read was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read and confirmed.

The Report of the Legal Education Committee respecting Law Students and Articled Clerks was received and adopted as to clauses 2, 3 and 4, and referred back to the same Committee as to clause 1, with instructions to report thereon during the present sitting of Convocation.

The Report of the Legal Education Committee on the petition of C. McMichael was received, read and adopted.

Mr. Osler moved that Messrs. Hoskin, Crombie and Martin be a committee to conduct the examination specified in the Report—Carried.

The Report of the Legal Education Committee on the case of Leith and others was received, read and adopted, with the exception of the 4th clause.

The Report of the Legal Education Committee on the cases of G. F. Cairns and others was received and adopted.

The Report of the Library Committee was received and read.

The Report of the Finance Committee was received and read.

The Report of the Legal Education Committee on Mr. Beemer's case was received, read and adopted.

The Report of the Legal Education Committee on the subject of the remuneration of examiners was received, read and referred to the Finance Committee.

Mr. Osler moved the resolution as to printing of minutes, &c, of Convocation. Motion referred to Finance Committee to ascertain probable cost of carrying out the same—report to be made next term.

On motion of Mr. Irving,

The Report of the Library Committee was considered.

Mr. Maclennan moved the immediate consideration of the report of the Reporting Committee—Carried.

Mr. Osler moved that reporters be appointed for Common Law Chambers and Chancery Chambers at annual salary of $250 each, and that the advertisement calling for applications for the appointments be at once published.

The Special Committee report that Mr. C. McMichael has been examined and is entitled to be called to the Bar.

Ordered, that Mr. C. McMichael be called to the Bar.

Mr. Blake moved that the report of the Finance Committee be taken into consideration—Carried.

Mr. Blake moved the adoption of the Report of the Finance Committee—Carried.

Moved by Mr. Lees, seconded by Mr. Irving, that the report of the Finance Committee now adopted be printed with appendices, and a copy thereof furnished to each member of Convocation—Carried.

Mr. Irving moved that the thanks of Convocation be given to V. C. Proudfoot, for his gift to the Library of his collection of appeal cases—Carried.

Ordered that Convocation do now adjourn until the 1st of March next, at 10:30 A.M., when the Benchers will meet to appoint Reporters in Chambers.

Ordered that the usual notice be given to each member.

SELECTIONS.

POWER OF COUNTY COURT JUDGES TO COMMIT FOR CONTEMPT.

Sir Richard Harrington, the County Court Judge of District No. 22, has just given a judgment on a point of the greatest practical importance to the litigant portion of the public—viz. as to the power of County Court Judges to commit for contempt committed *extra faciem curiæ*. Though, however, the point in discussion was confined to Contempts of Court falling within the category just mentioned the judgment deals exhaustively with the general powers of County Court Judges under the various statutes to punish for contempt; and it is a most valuable and eloquent exposition of the whole subject.

The immediate question at issue was whether the County Court Judge had jurisdiction to commit the defendant in an action for disobeying an injunction against the continuing of a nuisance complained of by the plaintiff. The action was tried on May 24, 1876; and the plaintiff, under section 89 of 36-37 Vict. c. 66 (Judicature Act, 1873), claimed damages, and, as already stated, an injunction to restrain the defendant from continuing the nuisance complained of—viz. stenches issuing from a manure manufactory of the defendant, and interfering with the plaintiff in the enjoyment of his dwelling-house. The Court, as already stated, granted the injunction which had been since disobeyed, and the plaintiff sought that the defendant

should for such disobedience be punished by imprisonment for his contumacy. The defendant, in answer to the plaintiff's application, filed affidavits on the merits; and, in addition, asserted that the Court had no jurisdiction to punish him for contempt, it not having been committed in the presence of the judge, and not being one of the forms of contempt specified in 9-10 Vict. c. 95. Section 113 of this Act is as follows:—

"And be it enacted that if any person shall wilfully insult the judge, or any juror, or any bailiff, clerk, or officer of the said Court for the time being during his sitting or attendance in Court, or in going to or returning from the Court, or shall wilfully interrupt the proceeding of the Court, or otherwise misbehave in Court, it shall be lawful for any bailiff or officer of the Court, with or without the assistance of any other person, by the order of the judge, to take such person into custody and detain him until the rising of the Court; and the judge shall be empowered, if he think fit, by a warrant under his hand, and sealed with the seal of the Court, to commit any such offender, to any prison to which he has power to commit offenders under this Act, for any time not exceeding seven days, or impose upon any such offender a fine not exceeding 5*l.* for every such offence; and in default of payment thereof to commit the offender to any such prison as aforesaid, for any time not exceeding seven days, unless the said fine be sooner paid."

The various County Court Acts passed after the above statute, and up to the County Court Act, 1865 (28-29 Vict. c. 99), contain no provision directly or indirectly affecting the power of the Court as to dealing with contempts. By section 1, however, of the last mentioned Act (which conferred a large equity jurisdiction on these Courts), the County Courts, in certain matters then only cognisable in a Court of Equity, are to have and exercise all the powers and authority of the High Court of Chancery; and, by section 2, in all suits and matters, the judge is, in addition to all the powers and authorities then possessed by him, to have all the powers and authorities, for the purpose of the Act, of a judge of the High Court of Chancery. Section 8 of this Act further provides that,

For the execution of any judgment, decree, or order made under the authority of this Act, ... the Court shall have power to order, and the registrar, upon such order, shall have authority to seal and issue, and the high bailiff to execute, any writ or warrant of possession, writ or warrant of execution, or other process of execution for carrying into effect any judgment, decree, or order of the said Court; and such writs, warrants, and processes shall be in the form and executed at the time and in the manner to be set forth in the rules and orders to be framed, &c.

The last statutory provision bearing on this subject is that contained in the Judicature Act of 1873, section 89 of which enacts as follows:—

Every inferior Court which now has, or which may after the passing of this Act have, jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal, ... in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

There are, apparently, no decisions on any of these enactments except that first quoted—viz. the 9-10 Vict. c. 95; but these decisions have a direct and important bearing on the question which was involved in this case. It was laid down in *Levy* v. *Moylan*, 19 Law J. Rep. C.P. 308, that there were strong reasons for the opinion that the courts held under that Act are inferior courts, though courts of record. In *Owens* v. *Breese*, 20 Law J. Rep. Exch. 359, it was held, in the Exchequer Chamber that though courts of record they were not courts of of record "proceeding according to course of the common law." Lastly, in *Ex parte Jolliffe*, 42 Law J. Rep. Q.B. 121, and referred to in Sir R. Harrington's judgment under the name of *Regina* v. *Lefroy*, it was held under section 3, in conjunction with section 13 of 9-10 Vict. c. 95, that a County Court Judge cannot commit for contempt a person who has published language of a contumelious character against him in a local newspaper, on the ground that the contempt was not *in facie curiæ*, and that it was not one of the contempts mentioned in

the Act. Lord Chief Justice Cockburn, in giving judgment, pointed out that if the County Courts, in the absence of express provision, possessed the same powers of punishing for contempt as the Superior Courts (that is, by indefinite imprisonment for contempts either *in facie* or *extra faciem curiæ*), there would be an obvious inconsistency in limiting the imprisonment for a gross contempt in the face of the Court to seven days, and to allow it, in the case of a contempt committed out of Court, to be extended to months or even years.

It was mainly on the authority of this case that Sir R. Harrington declined to commit the defendant for contempt for refusing to obey the injunction of the Court, on the ground that he had no jurisdiction to order a committal for a contempt not committed *in facie curiæ*, and not being one of the contempts mentioned in 9-10 Vict. c. 95. While, however, intimating that he felt bound by this decision he does not conceal that he disapproves of the reasoning on which it is founded; and while fully concurring in the opinion of the Court that the jurisdiction of an inferior court, though a court of record, is limited to those contempts which are actually or constructively committed *in facie curiæ*, he strenuously disputes the accuracy of the assumption that the jurisdiction of County Courts to commit for contempt is wholly founded on, and limited by sections 13 and 14 of 9-10 Vict. c. 95. Referring to the argument of Sir Alexander Cockburn, L.C.J., above mentioned, he says:—

"The attention of the learned Lord Chief Justice does not appear to have been called during the argument to the provisions of 28-29 Vict. c. 99, ss. 1 and 2, or we should probably have heard some further observations on the inconsistency and anomaly introduced by the Legislature itself in giving to a judge of these limited powers in ordinary matters the power to punish by imprisonment at discretion the breach of any order of Court, in however trivial a matter, made under the powers of the Act. For, notwithstanding *Regina* v. *Lefroy* (*i.e. Ex parte Jolliffe* above cited), I do not think it can be doubted that the language of 28-29 Vict. c. 99, s. 2, is strong enough to give the Judge of the County Court the same power to punish contumacious disobedience to orders of court *quoad* the subject-matter of the Act as was then possessed by the Vice-Chancellor; and, if this had been a proceeding under that Act, I should have no hesitation in exercising, if I had thought it otherwise just, the power of commitment."

We may add that this view of the power conferred by the Act just mentioned is confirmed by the order, rule, and forms under it. The order and rule prescribe the steps to be taken for committing for contempt for disobeying injunctions, and there is a form of order of committal given for disobeying injunctions. (See Order XVI., Rule 6; and Forms 41, 42, and 43.)

We cannot help remarking here that it seems rather a strange circumstance that the injunction was not applied for under the above Act, instead of under the Judicature Act, 1873. In looking through the form for an order of commitment for breach of injunction, we find, among the examples of matters ordered or forbidden by the injunction, the discontinuance of certain nuisances, as the obstruction of the plaintiff's light, &c.; from which it seems pretty clear that this case would have come under that Act. Again, although the injunction was granted under the provisions of the Judicature Act, 1873, if the application to commit the defendant for disobeying it was made without reference to the provision of any particular statute, would it not have been open to the judge to order the commitment under the above Act.—viz. 28-29 Vict. c. 99?

There is unquestionably some solid reasoning in support of the view that the Court of Queen's Bench erroneously decided that the power of commital by the County Court is limited to the case mentioned in sections 13 and 14 of 9-10 Vict. c. 95. The weak part of that decision is that, in limiting the power to the cases enumerated in those sections, you deprive the Court of the power of committal in cases which are at least constructively contempts *in facie curiæ*. Take for instance, the case of witnesses or others who remain in Court after an order that they should retire. Take, again, the case of a witness who refuses to answer a material question when ordered by the Court to answer it. These would be contempts *in facie curiæ*; but if the power to commit is limited to the cases

enumerated in the above sections, it would not extend to them. No doubt, as regards the case of a witness refusing to answer, the framers of the Act seem to have treated the case as one not involving a contempt *in facie curiæ*, and by section 98 prescribe another mode of dealing with such a witness—viz. by fine. But what of the other case, and many similar ones which one can easily conceive may at any moment arise? We have very little doubt, had the Court of Queen's Bench foreseen the effect of its decision—not in the merely granting or making absolute the rule for the prohibition, but in founding that decision on the assumption that 9-10 Vict. c. 95 impliedly limited the power of committal for contempt to the cases therein specified—it would have strictly based its conclusion simply on the ground that the contempt in that case was *extra faciem curiæ*. Had the decision gone on this ground *alone*, the County Court Judge in the present case may consistently with it have ordered a committal, as the case is very different indeed from *Regina* v. *Lefroy* (*Ex parte Jolliffe*); for there there was no pretence for contending that even constructively the contempt was *in facie curiæ;* whereas, in the present case it may very well be contended that disobedience to an order of the Court comes under the scientific conception of a constructive contempt *in facie curiæ*. It was, however, impossible, in the face of the judgment in the Queen's Bench, even assuming this to have constituted such a constructive contempt, to hold that the Court had the power to commit for it, as it is not one of the cases mentioned in section 13.

We confess, however, that we are not altogether satisfied by the reasoning which appears to have led Sir R. Harrington to the conclusion that the Judicature Act of 1873 did not empower him to make the order. He seems to us to attach undue importance to the circumstance that the provision giving the inferior "Court" certain powers, in language certainly wide enough to include that of committal for contempt in disobeying its orders, is not followed by a provision corresponding with that of 29-30 Vict. c. 99, giving the "judge" similar powers. The omission of this in the Judicature Act of 1873 does not seem to have been intentional; and the word "Court," as applied to County Courts, seems inevitably to include the judge of the Court. Had it been a provision relating to the Court of Bankruptcy, with regard to which it was held that a judge thereof did not come under the word "Court" (*Regina* v. *Faulkner*, 4 Law J. Rep. Exch. 308), the inferences may have been sustainable. But, as was pointed out in the argument in *Regina* v. *Lefroy*, that decision could not apply to the County Court, in which there was only one judge. Again, the conclusion drawn from the case of *Dawkins* v. *Rokeby* (cited from L. R. 8 Q.B. at p. 267; s.c. 42 Law J. Rep. Q.B. 63, in which it was laid down—but only as an *obiter dictum*—that the imprisonment of the defendant is no "redress" to the plaintiff), against including commitment for contempt for disobeying an injunction in the term "redress" used in the Judicature Act, 1873, does not seem to be accurately deduced. In the case of *Dawkins* v. *Rokeby* it was the imprisonment of a false witness which was stated not to be "redress" to the person against whom the false evidence was given. Here, as the imprisonment would tend, though only indirectly, to cause a discontinuance of the grievance which was the foundation of the proceeding, it may very well be contended that it would come under the word "redress." Again, the ground for holding that in this case imprisonment for disobeying the injunction would not be a "remedy" within the meaning of Judicature Act of 1873, is not more satisfactory. It is simply an opinion that the word applied rather to the granting of the injunction than to the proposed measure for enforcing the remedy already granted. But how can an injunction which the Court itself declines to enforce, by the only means by which it can enforce it, be called a remedy? The learned judge, however, points out that the remedy by injunction is not wholly nugatory, as the defendant may be proceeded against by indictment for disobeying it. As we do not see how an indictment could tend to the discontinuance of the original grievance, except through a corrupt compromise, we fail to see how the liability to

prosecution of a disobedient defendant in such a case would invest the injunction with the character of a "remedy" without the only action of the Court granting it, which would give it effect and vitality.

We trust that the invitation offered by the learned judge, towards the conclusion of his judgment, to the plaintiff to apply for a rule to compel him to hear the case on the merits, will be accepted and acted on; and that either the effect of the judgment in *Regina* v. *Lefroy* may be modified, or else that the attention of the Legislature may be called to a state of the law which certainly appears to require some alteration.—*Law Journal.*

PRIVILEGES OF COUNSEL.

When Mr. Justice Lindley was suddenly, at the end of a Long Vacation, translated from the ranks of the bar at Lincoln's Inn to the Court of Common Pleas, and remitted to the task of trying special jury cases, the desire of the counsel who practised before him to make his path easy was most marked. No one sought to embarrass him with subtle objections and artful stratagems, or to presume in any way on his inexperience of Nisi Prius work; and his lordship got through the November sittings without a hitch in the progress of business, without a dispute with counsel, and without betrayal of his noviciate. Lord Justice Cotton, who last week was called upon to leave the serene regions of the Court of Appeal for the troubled scenes of a Criminal Court, was not so fortunate as Mr. Justice Lindley. It was his lordship's fate to try two murderers; and we can quite understand the weight of responsibility that must have been felt under such circumstances by a judge who, for all we know, may never on any previous occasion have been present at the trial of a criminal. But, as if the burden thus thrown on the judge was not sufficient, his lordship was brought into collision with the counsel who defended the prisoner in one of these cases, and felt himself compelled to complain of the conduct of that counsel towards the bench. Such encounters as these are always matters to be deplored. They are rare—happily so. But when the judge is new to the work set before him, they become yet more regrettable, because they give rise, however unjustly, to the suspicion that an attempt has been made by counsel to presume upon the inexperience of the judge, and to invade his province for the purpose of unduly influencing the jury. We say "however unjustly," for we do not for a moment desire to impute any such design to Mr. Ribton, the counsel to whose conduct we refer. On the contrary, we are sure that his fault, if any, was attributable purely to his earnest zeal for his client, and not to any premeditated intent to impede the action of the judge. Indeed, the apology which Mr. Ribton tendered to the judge, and which his lordship frankly accepted, clearly exonerates Mr. Ribton from any imputation of such intent.

In the early party of his address to the jury the learned counsel used expressions of belief as to his client's innocence of the charge of murder; and the Lord Justice, following a notable precedent set by the Lord Chief Justice, at once interrupted him. Mr. Ribton explained that he was speaking of his belief in the proposition of law that the facts proved were such as to reduce the crime from murder to manslaughter. We hope the painful scene of counsel expressing belief in a client's innocence will never be witnessed in our days, and we are glad to think that Mr. Ribton was misunderstood by the judge. The expression of belief in a legal proposition is of course justifiable, although the form of expression is very apt to mislead. But in this case the jury could hardly have misinterpreted the language of counsel; for his whole argument was, that, all the facts being admitted, a certain legal consequence would follow. On this part of the case, therefore, it seems to us, that, although Mr. Ribton might have been more guarded in language, yet he did not mean for a moment to express any sort of belief upon the issues of fact before the jury.

What occurred, however, at the close of the trial cannot be so easily disposed of. It was proved that the prisoner Mumford had said to the police officer: "She has been a bad wife to me; she has aggravated me; she has taunted me, telling me that her unborn child was not mine." Mr. Ribton argued that the jury might conclude that the wounds from which Mumford's wife died were inflicted by Mum-

ford immediately on his hearing these words, so as to bring the case within the ruling of Lord Blackburn under like circumstances, and reduce the crime to manslaughter. Lord Justice Cotton, on the other hand, in summing up, pointed out to the jury that the proper inference from the facts proved was, that this was not so; but that the prisoner, in what he said to the constable, was speaking of language used by the woman on a previous occasion. So far counsel and judge were acting plainly within their respective provinces. But after the learned judge had addressed the jury, Mr. Ribton again rose, and re-stated his argument. What occurred was thus reported in the *Times*:—

Mr. Ribton, before the jury retired, said he must submit to his lordship that it might be presumed the prisoner in his statement to the officer after he was charged before the magistrate must have made it with reference to that charge, and therefore with reference to the night in question.

The Lord Justice: Mr. Ribton, that observation ought not to have been made; for, as I have pointed out, the statement was made in the same connection as a statement which clearly referred to something that had occurred on a previous occasion.

Mr. Ribton still urged that the presumption was that it was made with reference to the night in question.

The Lord Justice: Mr. Ribton, you are not justified in making those observations. I have endeavoured—and it is a very painful duty—to lay down the law correctly to the jury, and it is their duty to take the law from me and to find such a verdict on the evidence as their consciences may dictate in accordance with that direction.

Mr. Ribton still argued that there was a legal presumption.

The Lord Justice: Mr. Ribton, really, I cannot allow this.

Mr. Ribton: My lord, you are very peremptory.

The Lord Justice: Mr. Ribton, I am compelled to be so.

Mr. Ribton: My lord, this a case of life and death, and I am not to be put down in the discharge of my duty.

Mr. Ribton then admitted that it had appeared that the prisoner had had previous suspicions; but still he urged that it was to be presumed, from the prisoner's own statement, that the taunt had been made to him on the night in question, and that if it had been so made it was calculated to arouse him to a state of frenzy by confirming his previous suspicions.

The Lord Justice, with great calmness: Gentlemen, I think that counsel has exceeded his duty upon this occasion. It is the duty of the judge, as calmly as possible, to hold an even hand between the prosecution and the prisoner, and I hope I have done so; and in consequence of these observations of the prisoner's counsel I will read to you again what was said by the police constable, the witness who spoke to the prisoner's statement.

His lordship then read the evidence again, and made some further comments thereon, in effect re-stating the propositions contained in his summing up.

Now just as at the close of a summing up by the judge at Nisi Prius, counsel are at liberty to make a reference to a direction given on a matter of law by the judge for the purpose of asking the judge to correct the same, or to state it more definitely, or it may be with some addition or limitation, so also we take it that in a criminal prosecution counsel may submit that the case ought not to go to the jury with the direction on matter of law given by the judge. But, on the other hand, it is manifest that counsel has no right, under cover of his privilege, to win the last word with the jury, or to attempt at that stage to make the jury believe that in law they are bound to find any given verdict in the face of what has fallen from the judge. Every one who has attended criminal trials must have noticed the great latitude allowed to the counsel for the prisoner. There is practically no limit to his right of cross-examination, however harsh he may be towards the witness, or however wide may be the scope of the questions put. So, also, the flights of his oratory are boundless. But when counsel has had his turn, it is the duty of the judge to address the jury, and, as the Lord Justice so well said, "to hold an even hand between the prosecution and the prisoner;" and after that it is not the duty, nor the privilege, nor in any sense the right, even in matters of life and death, for counsel to intervene between

judge and jury, and to attempt in any way to lessen the effect produced on the mind of the jury by the words of the judge. That Mr. Ribton exceeded his privilege must, we fear, be admitted. Indeed his own apology shows that he thought so. Had the mistake been committed by a young and inexperienced advocate, the matter would have scarcely attracted attention. But Mr. Ribton is no novice, and he can hardly avoid the censure that must wait on those who set a bad example. The Lord Justice acted throughout with characteristic calmness and forbearance, and accepted Mr. Ribton's apology with frankness and generosity. There have been, and are, judges who would have been more prompt to rebuke, and less ready to condone.—*Law Journal.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From Q.B.] [Feb. 3.

Denny v. The Montreal Telegraph Company.

Trap-door—Negligence—Contributory negligence—Evidence.

The part of the defendants' office devoted to the public was some sixteen and a half feet long, from south to north, the entrance door being at the south, and the width was five feet seven inches. About four feet nine inches from the south, and on the east wall was a desk or counter, for writing messages, seven feet six inches long, and one foot seven inches wide. About five inches north of the counter, and in the centre of the apartment there was a trap-door leading to the cellar about two feet nine inches square. On the west side of the apartment was a partition about six feet high, separating the public office from the operators' apartment, the entrance to which was at the north end of the partition. In this partition there was an opening with a desk in it, where also messages were written and delivered to the operator. D. came in quickly to send a message, spoke to the operator at this opening, and then went beyond the counter as if to go into the operators' room, when, the trap-door being open, he fell through into the cellar, and received injuries of which he died. There was evidence given to show that deceased said it was his own fault, and that he ought not to have been where he was; that the office was a very light one, and that there was no difficulty in seeing the trap, but it also appeared that other persons on other occasions had nearly fallen into it. The learned Judge who tried the case, without a jury, and viewed the premises, found that the deceased was guilty of contributory negligence, which precluded the plaintiff, his administratrix, from recovering. Held in the Court of Queen's Bench that the defendants were liable; that the evidence of the open trap-door in the part appropriated for the public was negligence for which the defendants were chargeable; that there was no evidence of contributory negligence on the part of the deceased; and that the plaintiff would be entitled to have the verdict entered for him if the damages had been assessed; but this not having been done a new trial was ordered.

Held, in the Court of Appeal, dismissing the appeal, (without deciding whether they would have come to the same conclusion in reversing the decision of the learned Judge who tried the case, as the Court of Queen's Bench,) that sitting as an appellate court, there was no sufficient reason for arriving at a different conclusion; and, that, under the judgment pronounced in the Court below, it would be useless to submit the case to another jury, the Court below should have assessed the damages which they now did.

C. Robinson, Q.C., for the appellant.

S. Richards, Q.C., for the respondent.

Appeal dismissed.

From Chy.] [Feb. 3.

Nelles v. Paul.

Insolvent Act 1875—Payment—Fraudulent preference.

The insolvent paid a note within thirty days of his being placed in insolvency in

accordance with a request made by the sureties just before the issue of the writ of attachment. It appeared that when the sureties made this request, neither they nor the creditor knew or had probable cause for believing that the insolvent was unable to meet his engagements in full.

Held, reversing the decree of Proudfoot, V.C., that the payment was not void within the meaning of the Insolvent Act.

E. Meredith, Q. C., for the appellants.

J. A. Boyd, Q.C., for the respondents.

Appeal allowed.

From C. C. Carleton.] [Feb. 3.

Kelly v. Ottawa Street Railway Co.

Limitation of action against Railway Co.—C. S. C. c. 66, s. 83.

The plaintiff sued the defendants for an injury sustained by him while engaged in his lawful occupation upon the street by the negligent management of the defendants' car, and the unskilful or reckless driving of their servant.

Held, reversing the judgment of the County Court, that the 83rd section of the Railway Act, which was incorporated with the defendants' special Act, applied to a suit of this nature, and the action not having been brought within six months, the plaintiff must fail.

Snelling for the appellants.

Shepley for the respondent.

Appeal allowed.

From C. C. York.] [Feb 3.

Shepley v. Hurd.

Action on note—Plea that plaintiff not lawful holder.

A note having been placed in the hands of a firm of solicitors to sue, they got the authority of the plaintiff, who was then a clerk in their office, to use his name for the purpose of the suit, as the holder, for some reason, wished to take proceedings without his name appearing.

Held, reversing the judgment of the County Court, that a plea that the plaintiff was not the lawful holder was bad.

Semble that it is not essential that the plaintiff should have had physical possession of the note.

Bain, for the appellants.

McMichael, Q.C., for the respondents.

From Chy.] [Feb. 3.

Russell v. Romanes.

Specific performance.

The bill was filed to enforce specific performance of an agreement to sell certain land, made by one R. since deceased. The original agreement was cancelled, and on the 22nd May, 1866, another agreement contained in a lease of the land from R. to the plaintiff was substituted therefor. In November of 1865, when the original agreement was entered into, R. who held two mortgages on the land in question, thought he had obtained an absolute title thereto, by proceedings on a foreclosure suit on these mortgages. It afterwards, however, appeared that long prior to the first of the mortgages held by R., the mortgagor T. H. had by a voluntary deed conveyed 50 acres of the land to his son E. H. subsequently to the first mortgage to R., but prior to the second mortgage, E. H. mortgaged the 50 acres to one A. E. H. was not made a party to the foreclosure suit, but A. was served with notice of the proceedings in the Master's office, and not having appeared, he and the mortgagor were declared foreclosed. Soon after the above agreement for sale, E. H.'s outstanding equity of redemption was discovered, and in September, 1866, R. filed a bill against T. H., E. H. and A. for the foreclosure of his two mortgages against all these defendants, when a decree was made declaring the deed to E. H. to be void against R., and that A.'s mortgage was subject to the first mortgage, but had priority over the second mortgage held by R., and he was directed to pay into Court a certain sum as the price of redemption, which payment was made at the appointed time.

It appeared that the plaintiff had actual notice of E. H's outstanding equity of redemption soon after the substituted agreement, and before he made any improvements; and that he made them in reliance upon R. holding him harmless.

Held, affirming the decree of Proudfoot, V. C., that the plaintiff was not entitled to a decree for specific performance against the representatives of R., as they had no power to convey, nor against A., because there was no priority between him and the plaintiff, and no equity to make him bound by the agreement.

Held, also, that the plaintiff was not entitled to a lien on the land for his improvements.

The *Attorney-General* and *Bethune*, Q.C., for appellants.

Boyd, Q.C., *W. Cassels*, *C. Atkinson*, *and Machar*, for the respondents.

Appeal dismissed.

From Chy.] [February 3.

Fisken v. Brooks.

Equitable execution.

Under his father's will the defendant J. E. B. was entitled to certain real and personal estate, which was bequeathed to him. upon the following trust "in the first place to and for the support and maintenance of his wife in a fit and suitable manner according to their rank and station, during their joint lives and during the life of the survivor of them; secondly for the support, education and maintenance of the children of the said J. E. B. and B. J. B., now living, or which may be hereafter born, the fruit of their marriage, according to their rank and station in life, and at the discretion of the said J. E. D. and B. J. B.

Power was given to the defendant and his wife jointly during their lives, and to him, if he was the survivor, but not to her if she was the survivor, to sell the lands, mortgages and all other securities and to stand possessed of the proceeds upon the same trusts. Further power was given to them jointly and to the survivor to divide the real and personal estate or the proceeds thereof, or so much thereof as there remained unexpended and unappropriated in carrying out the trusts between the said children and their said heirs, if any, in such manner and in such proportion as to them might seem fit, or to exclude any of them entirely from any benefit or portion thereof if they should see fit, so to do or to convey or make over to any of them by way of advancement any portion of the same to become theirs absolutely.

Held, (reversing the decree of Proudfoot, V. C.) that the gift was for the benefit of the defendant and his wife jointly, and that the defendant's interest could not be attached by an execution creditor.

Dalton McCarthy, Q.C., and *Hoskin*, Q.C., for the appellants.

Boyd, Q. C., for the respondent.

Appeal allowed.

From C. P.] [Feb. 14.

Fowler v. Vail.

Foreign judgment—Pleading—23 Vic., c. 24, sec. 1; 39 Vic., c. 7, O.; 31 Vic., c. 1, sec. 34.

To an action on a foreign judgment commenced previous to the repeal by 39 Vic., c. 7, O., of 23 Vic., c. 24, sec. 1, which allowed the defendant to set up to the action on the judgment any defence which was or might have been set up to the original suit, the defendant, after the passing of the repealing Act, pleaded several pleas setting up such defences.

Held, reversing the judgment of the Common Pleas, that they could be pleaded as the right to plead was an existing right within the meaning of section 34 of the Interpretation Act, 31 Vict., c. 1, O.

A further plea to the judgment averred that the defendant was not at the commencement of the action nor down to the judgment resident or domiciled in the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action or before the recovery of judgment have any notice or knowledge of any process or proceedings in the action, nor of any opportunity of defending himself therein.

Held, affirming the judgment of the Court of Common Pleas, that plea was bad for not averring that the defendant was not a subject of the foreign country.

C. Robinson, Q. C., (with him, *A. Bruce*) for the appellants.

J. K. Kerr, Q.C., (with him, *J. W. Jones*) for respondents.

Appeal allowed without costs.

VACATION COURT.

February 21, 1879.

Reynolds v. Corporation of Ontario.
Action by Sheriff—Audit by County Auditor—Whether Conclusive.

Action by the Sheriff of Ontario to recover $5654.88 for services stated to have been rendered by the plaintiff in connection with the administration of justice within the county, alleging that the amount was duly rendered to the proper officer and duly audited and allowed by the County Board of Auditors in accordance with the Statute, and that plaintiff thereupon became entitled to recover the same out of the funds of the county, and that though the plaintiff had duly demanded payment from the defendants and their treasurer, they had neglected and refused to pay the same.

Held by Cameron J. that the audit was not conclusive, but the circumstances under which it was made may be shown; a plea therefore setting up such power was held a good plea.

C. Robinson, Q. C., and *H. J. Scott* for the plaintiff.

Hector Cameron, Q.C., for the defendant.

CANADA REPORTS.

ONTARIO.

CHANCERY CHAMBERS.

(*Reported for the* Law Journal *by* F. Lefroy, *Barrister-at-Law.*)

Mallory v. Mallory.
Appointment of next friend.

Where the defendant's solicitor, on asking the plaintiff's solicitor to consent to give further time to answer, handed to him the affidavit on which he intended to move, which stated his object to be to gain time to apply for a next friend, *but omitted to call the attention of the plaintiff's solicitor to this statement. Held*, that the asking for the consent, notwithstanding the said statement, amounted to a waiver of defendant's right to apply for a next friend.

[Mr. Stephens, Nov. 9—Chancellor, Dec. 28, 1878.

In this suit a bill had been filed by a married woman without a next friend. The plaintiff married before March 2, 1878.

Black now moved for an order to take the bill off the files for irregularity, in having been filed without a next friend. He referred to R. S. O., c. 125, sec. 20, and cited *Redman* v. *Brownscombe*, 6 Pr. R. 84; *Royal Canadian Bank* v. *Mitchell*, 14 Gr. 412; *Chamberlain* v. *Macdonald*, 14 Gr. 447.

Hoyles, contra: The affidavits show that the plaintiff has waived his right to ask for the order, as he asked for and obtained further time to answer. The application is equivalent to a demurrer, and a defendant cannot demur after getting time to answer, *Boultbee* v. *Cameron*, 2 Chy. Ch. 41; *Chamberlain* v. *Macdonald*, 2 Chy. Ch. 204. The objection should have been taken at the earliest opportunity, Dan. Chy. Pr. 5th Eng. Ed. 30, 103; *Arthur* v. *Brown*, 3 Chy. Ch. 396; *Atkins* v. *Cooke*, 3 Drew. 694. An objection for want of a next friend stands on the same footing as the right to security for costs.

Black, in reply: The irregularity here is not such as those referred to in the cases cited. The Court may order a next friend to be appointed at any time, Dan. Chy. Pr. 103. There has been no waiver. When the defendant's solicitor asked for time to answer he placed the affidavit upon which he intended to move in the hands of the solicitor for the plaintiff. This affidavit shewed that the object was to obtain time to make an application to have a next friend appointed. The plaintiff's solicitor endorsed his consent to give ten days further time to answer upon this affidavit presumably after having read it. In the report of *Boultbee* v. *Cameron*, on which our practice seems founded, it appears that when the defendant's solicitor applied for time to answer, "*nothing was said at the time as to demurring.*" Hence *Boultbee* v. *Cameron*, and *Chamberlain* v. *Macdonald*, which follows it, have no application to the present case.

The Referee granted the order, holding that as the affidavit on which the defendant intended to move was sent by the solicitor to his agent for the express purpose of being shewn to the plaintiff's solicitor, and was, in fact, handed to him as the material on which the motion would be made, and as it was not stated or insinuated that there was any intentional suppression of fact, the defendant ought not, under all the circumstances, to be considered to have waived his right to demand the appointment of a next friend.

The plaintiff appealed from the order of the Referee.

The appeal was heard by the Chancellor on the above date.

Counsel urged the same arguments as before.

The Chancellor: The cases shew that where a suit is instituted by a married woman against her husband in respect of property, it is a general rule that she must sue by her next friend. I do not understand it to be contended by the solicitor of the plaintiff that the subject of this suit is of such a nature as to take it out of the general rule; but his contention is that the solicitor for the husband, on the day before that on which the time for answering could expire, asked and obtained from the solicitor of the plaintiff ten days' further time to answer; and this he contends was a waiver of his right to require that the plaintiff should sue by her next friend.

He contends, and I think rightly, that an objection for the want of a next friend, whether taken by demurrer or otherwise, stands upon the same footing as the right to security for costs; and it is clear that in the latter case the plaintiff waives his right. That, at least, was my opinion in *Boultbee* v. *Cameron*, 2 Chy. Ch. 41, where a defendant having obtained from the plaintiff's solicitor further time to answer demurred instead of answering, I directed the demurrer to be taken off the file. The language of V. C. Kindersley in *Atkins* v. *Cooke*, 3 Drewry 695, supports my opinion.

The learned Chancellor then quoted a passage from the judgment of V. C. Kindersley in that case and continued:

The consent in this case ran thus: "We consent to an order giving defendant ten days further time to answer." This consent was endorsed upon an affidavit which, as it afterwards appeared, contained a statement to the effect that it would be necessary to apply to have a next friend appointed to the plaintiff before answering. This was not brought under the notice of the plaintiff's solicitor, as it certainly ought to have been. He was informed by the gentlemen who asked for his consent that the defendant's solicitor had received instructions to defend only the previous day. Being told this, and the request being for time to answer—not for time to take objections to the plaintiff's proceedings—he had a right to infer that it was only for the purpose of answering that time was asked. He states in his affidavit that if he had been aware that the affidavit contained the statement in question, he would not have given time to answer, but would have noted the bill *pro con.* as soon as the time for answering had expired.

I look upon what passed on the application to the plaintiff's solicitor for his consent for time to answer as a suppression of that which ought to have been disclosed, and I am clear that the defendant can derive no advantage from that suppression.

What the defendant's solicitor would have done if the consent had not been given is beside the question. The consent was obtained for time to answer, and time obtained for *that* purpose could not, in good faith, be used for any other purpose.

Appeal allowed with costs.

Becher v. Webb.

Admission of incumbrancer foreclosed by Master's report.

Where an incumbrancer had been foreclosed by the Master's report but the neglect to come in was partially explained, and the application was made promptly, he was admitted to prove, but only on his relinquishing priority over a puisne incumbrancer who had come in within time.

[Mr. Stephens, Jan. 9.

In this matter two incumbrancers having been made parties in the Master's office, the puisne incumbrancer came in and proved his claim, but A., the prior incumbrancer, omitted to do so, and was foreclosed by the Master's report, filed Nov. 6, 1878.

Langton now moved for an order to allow A. to come in and prove his claim, and to have priority over the puisne incumbrancer. It appeared by the affidavit of A. that (1) the affidavit sent to him by his solicitors to make, in order to prove his claim, had been mislaid, and was not discovered till his time for proving had expired; (2) that some time then elapsed before he could identify the original defendant to be the man against whom he had recovered certain judgments;

(3) that he had not been able to discover that the defendant had any other property except that in question in this suit. *Sterling* v. *Campbell*, 1 Chy. Ch. 147, was cited to show that if A. was admitted he had a right to his priority over the puisne incumbrancer.

Hoyles, contra: (1) Having neglected to come in and prove, A. should not now be admitted to the prejudice of another incumbrancer, *Cameron* v. *Wolfe Island Co.*, 6 Pr. 91; (2) the puisne incumbrancer having, by his diligence, secured his rights, ought not to be deprived of them: *Hall* v. *Falconer*, 11 Jur., N. S. 151; *Cattell* v. *Simons*, 8 Beav. 243; (3) the delay will not be passed over merely because A. will thereby be unable to realise his debt, *Finnegan* v. *Keenan*, 14 L. J. N. S. 123; (4) the applicant has no equity against the puisne incumbrancer, and has not accounted for his negligence.

Fletcher, for plaintiff, consented to the order being made, but asked for costs.

The Referee granted an order allowing A. to come in and prove his claim on his undertaking to rank after those who had already proved.

McDermid v. McDermid.

Sale under decree—Right of mortgagee to notice of payment in of purchase money—G. O. 389.

Where lands encumbered by a mortgage are sold in a partition suit, a mortgagee of the interest of a tenant in common, though a party to the suit, is entitled to notice of the payment into court of the money out of which his claim is to be satisfied, and where the rate of interest reserved in the mortgage is more than the legal rate, it is incumbent on the mortgagor to see that such notice is given, in order to protect him from liability to such higher rate.

[Referee, Dec. 18, 1878.—Proudfoot, V. C., Jan. 20, 1879.

Here the decree was the usual one in a partition suit. Under it one C., a mortgagee of the undivided shares of the defendants J. and A. in the lands in question was made a party. J. and A. put in a cash tender for the lands which was accepted, and they were declared the purchasers, the purchase money to be paid into court by the 15th of March. The report, dated 1st March, computed interest on C's mortgage (which had three years yet to run) up to the 15th March. The money was not paid into court before 26th Sept. following. Shortly after payment in the purchasers obtained a vesting order on notice to the plaintiff's solicitors, but they served no notice of payment in on C., their mortgagee, and he only learnt by chance of such payment on or about the 15th of Nov., when as soon as possible he made this application.

Seton Gordon, for the mortgagee, moved for payment, out of the shares of the mortgagors of the purchase money in court, of the amount of the applicant's claim with interest at the rate named in the mortgage to date, with six months' subsequent interest at the same rate, and for the costs of the application. A mortgagee always has a right to retain his security until the amount due thereon is duly and properly tendered him. The fact that he has been made a party under a decree does not affect this right. Here the applicant submitted in the Master's office to take the amount due to him on his mortgage up to March 15th, on the understanding that the money was to be paid into court on that day, according to agreement. The money was not so paid, hence, the contract being broken, the mortgagee is released from his engagement, and now claims interest as above, as given by the decree, and as he might have claimed in the Master's office. He had undoubted right to notice of the payment into court. An analogy may be found in G. O. 486, relating to administration suits.

Foster, for plaintiffs, had no objection to order being made so far as J. and A. were concerned, but submitted that no part could be charged against the other parties.

Hoyles, for defendants J. and A., referred to the Vesting Order and paper filed on that application to show notice was given to the mortgagee of payment into court. In a partition suit an incumbrancer can be compelled to accept the money at any time, and is not entitled to six months' interest. *Dalby* v. *Humphrey*, 37 Q. B., 514; *Cook* v. *Fowler*, L. R. 7 H. L. 27.

Gordon in reply: This does not apply where the mortgage is not due.

The Referee held that by letting so many months go past without enquiry or action, the applicant had deprived himself of the right to demand additional interest after the payment of the purchase money into court, if he ever had any such right; and that the application should be dismissed. Under the order made by the Referee interest was therefore allowed at 12 per cent. up to the date of payment into court only, and bank interest afterwards.

On appeal from this decision the demand for six months' subsequent interest at the rate in the mortgage was dropped.

W. Cassels, for mortgagee, claimed interest at said rate up to date. Under the proviso in the mortgage 12 per cent. is payable till the time fixed. The purchasers were mortgagors and therefore liable under their covenants to pay this. No relief is asked against the plaintiff.

Hoyles, for the mortgagors: Under G.O. 389, purchaser is only bound to give notice to the plaintiff of payment in, and it is plaintiff's duty to notify other parties. Laches of C. disentitle him to relief. C. is a party, and after decree all parties are actors: he should have pressed for payment in.

Foster, for plaintiff, asks for costs.

Proudfoot, V.C., gave judgment as follows, after first stating the facts:—

The Referee gave the mortgagee interest at the rate specified in the mortgage until time of payment into Court.

It is now contended that he was entitled to interest till notice of payment into court. And I think him so entitled, and at 12 per cent. The time for payment of the mortgage had not arrived, and the contract for this rate of interest covered the period in question—distinguishing it from the cases where the contest was for the rate specified in the security after the time for payment had elapsed.

The purchasers in the capacity of purchasers were, under Reg. Gen. 389, only bound to notify the person having the conduct of the sale. But they also filled the character of morgagors, to relieve themselves from liablity on the mortgage were bound to see that the money reached the mortgagee, and this they did not do.

The amount is not large and it is contended that an appeal should not be entertained. But the appellant is a mortgagee and is entitled to all the costs incurred in necessarily enforcing his security. And there is a question of principle involved in the application, which takes out of the rule acted on in *McQueen* v. *McQueen*, 2 Chy Ch. 344.

Appeal allowed with costs.

Re Kingsland's Mortgage.

Payment into Court—Imp. Act, 10-11 *Vict. c.* 96.

Where trustees, having had a certain mortgage assigned to them to secure a debt due to the trust estate, realized the security, and after satisfying the claim, still had a surplus remaining. *Held*, they were entitled to pay their surplus into Court under the Imperial Trustee Relief Act. 10-11 Vict., c. 96.

[Spragge, C., Jan. 27, 1879.

In this matter, K. being a debtor to a certain estate assigned a mortgage, of which he was holder, to the trustees of the said estate, as security for the debt due by him to the estate. The trustees realized the mortgage which left a surplus in their hands after payment of the said debt. A third party then put in a claim to the surplus, averring an assignment from K. who had left the country: he, however, produced no proofs of title.

W. Roaf now moved *ex parte* on petition on behalf of the trustees for an order that the trustees should pay the surplus in their hands into Court, under the Imperial Trustee Relief Act, 10-11 Vict. c. 96 (R. S. O. c. 40, sec. 36.) He cited *Roberts* v. *Ball*, 24 L. J. N.S. Chy. 471, and *Western Canada Loan and Savings Co.* v. *Court*, 25 Gr. 151, submitting that the latter case was an authority in favour of the motion, although the head note might give a contrary impression.

The Chancellor:—Mr. Roaf refers me to *Roberts* v. *Ball*, 24 L. J. Chy., as an authority for the payment into court of the balance in the hands of the petitioners after satisfying the mortgage of which they were holders as trustees. There was no question in the case as reported,

as to the propriety of the first mortgagee paying into court the surplus remaining in his hands after satisfying his own mortgage. He had already done this and the second mortgagee came into court upon petition raising other questions not in point in this suit. All that the case shows is that what is asked in this court had been done without, so far as appears, any question in that case.

In the *Western Canada Loan & Savings Co.* v. *Court* 25 Gr. 151, a mortgagee had sold under a power of sale in his mortgage, and there was a surplus which was claimed by two contesting parties, and the mortgagee thereupon filed a bill of interpleader. Court, one of the defendants, objected that the mortgagee should have done what the petitioners in this case have done, apply to pay the money into court under the Trustee Relief Act, but my Brother Proudfoot held an interpleader bill proper, observing that he did not think that there was such an express trust as would come within the meaning of the Trustee Relief Act.

In *Roberts* v. *Ball*, which was not cited in the case before my learned Brother, there was not any express trust, but at any rate in the case in Grant an interpleader Bill was clearly right. In the case before me there could be no interpleader suit, for there are no parties to interplead and the petition alleges a trust.

I think the case is within the Trustee Relief Act. As to the petitioners being released and discharged it will be expressed to be from liability in respect of the money paid into court. I do not decide of course whether it is the proper sum or not.

Order granted.

Norval v. Canada Southern Railway Co.

Appeal—Costs—R. S. O. cap. 38, secs. 27, 28.

When the objection is taken that an appeal is frivolous and no reasons for appeal are given, the Court will examine the pleadings to see if the appeal is frivolous. The appellants must pay the costs of an application to stay execution.

[Proudfoot, V. C., Feb. 10, 1879.

In this matter the appellants had given the statutory notice, and taken all necessary steps for appeal within the proper time, but the reasons for appeal had not been served. A motion for an order staying execution under Appeal Act (R.S.O. c. 38, secs. 27, 28) and Order 8, was then made before the Referee, but at the request of the plaintiff it was enlarged before a judge.

On the above date,

Symons moved for the order, the security having been perfected and allowed.

Boyd, Q.C., contra, objected to the stay of execution on the ground that the appeal was frivolous, under R.S.O.. c. 38, sec. 28. The matter was in fact *res judicata*, as the pleadings shewed. On the question of costs he cited *Lady Mary Topham* v. *Duke of Portland*, 1 De G. J.,S. 603.

Symons in reply: The reasons of appeal not having been served, the answer must be taken to contain the reasons, and they are sufficient. Appellants have taken all steps within time and *bona fide*.

Proudfoot, V.C., held he would have to take the answer as containing the grounds of appeal, and they certainly were not frivolous. The appellants must go to appeal next month if possible, and if the appeal was not heard then a further application might be made. Appellants to pay the costs of this application.

McTaggart v. Merrill.

In the report of this case contained in the last number of this Journal, the head-note should rather have been: "The Court has power to grant leave to serve notice of motion for decree by publication, though contrary to English practice." The fact that a previous order of revivor had been served by publication had no bearing on the matter.

COUNTY COURT OF WENTWORTH.

(*Reported by* John F. Monck, *Esq., Barrister-at-Law.*)

Re Richard P. Street.

Insolvency—Valuation of security—Application to reduce refused.

Two secured creditors duly proved their claim, valuing their security; and the assignee elected to allow them to retain such security.

Upon the application of those creditors, after such election, for leave to withdraw their proof and reduce the value placed on their security, and prove against the estate for the sum by which it should be reduced, on the ground that the valuation was excessive, and had been made inadvertently,

Held, that they were bound by the value stated in their affidavit of claim.

[Hamilton, Dec. 21, 1878.

This was a petition by two creditors of the estate of Richard P. Street, an Insolvent, for leave to withdraw proof made by such creditors against the said estate, under a mortgage of real estate, and praying to be allowed to reduce the value placed on the security of such real estate by $200.

Papps, for the petitioners.

Parkes, for the assignee.

The facts are fully set out in the judgment of the learned Judge given below :

Sinclair, Co. J.—In this case, insolvency took place on the 17th of August, 1878, in virtue of an attachment issued that day against the insolvent. On the 3rd of September following, the petitioners, being two ladies, residing in the Village of York, in the County of Haldimand, who had a mortgage on certain real estate of the insolvent's, filed their claim against the estate, and placed a value of $1,200 on their security, under the 84th and 86th sections of the Insolvent Act.

No negotiations took place between the assignee and these secured creditors, about the retention of the security by them, until the 15th of November last, when their solitor wrote to the assignee to know what he intended to do in respect of their claim.

On the following day the assignee wrote to the solicitor of these petitioners that he would allow them to retain their security. Application was subsequently made to the assignee to allow these creditors to amend their claim by placing the value of their security at $1,000, instead of $1,200. The assignee, conceiving he had no power to allow this to be done, refused their request.

The present petition was, therefore, filed for the purpose of allowing these two secured creditors to reduce the value of their security by $200, and thereby enabling them to prove against the insolvent's estate beyond the value placed on the security for so much additional. It is urged on their behalf, and as a reason why this application should be granted, that the insolvent invested the money represented by their mortgage security for them ; that they trusted to his good faith in the matter ; that he caused to be prepared on their behalf the proof of claim and the specified value of their security, and caused the same to be filed ; and represented to them about that time that he had had the mortgaged premises valued, and that they were not worth more than $1,200, the amount at which the value of the security was placed.

These creditors either did not take any means to ascertain the correctness of the value placed on the security for them by the insolvent, or, if they did ascertain its incorrectness, took no means to correct their proof of claim, or the value placed upon such security, until after the assignee's letter of the 16th of November, 1878, intimating that he elected allowing them to retain their security.

It does not appear that the insolvent, acting on their behalf, was not perfectly conversant with the state and value of the property when he filed their proof of claim, or that they caused any enquiry to be made as to the correctness of his representations.

Lately, however, and, as I gather from the affidavits, *since* the assignee refused to take the property on behalf of the estate, these creditors have ascertained that their security, instead of being worth $1,200, is not worth more than $1,000. It is urged on their behalf, in support of this application, that they should not be bound by the estimate of value formed by the insolvent for them, and that in any case, as a mistake has been made as to the value, they should be allowed to amend it.

In the first place, I cannot see why, if they entrusted the valuation of their security and their proof of claim to the insolvent, they should not be bound by his actions in the same way as any other principal is bound by the acts of his agent acting within the scope of his delegated authority.

It may be that they were unfortunate in engaging or allowing the insolvent to so act

on their behalf in this matter, but with such considerations we have no concern in this proceeding. But there was from the 3rd of September until the 17th of November for the purpose of making enquiry. During that time nothing was done on their behalf except some negotiations with the assignee about his taking the property covered by the security. Probably the assignee unduly delayed deciding upon what he should do, but that would only entitle the petitioners meantime to apply to amend or withdraw their proof of claim and valuation of security, or to compel the assignee to perform his duty.

When the petitioners' solicitor wrote to the assignee on the 15th of November, all parties considered the negotiations as then pending, and neither one should now be allowed to say anything to the contrary: see *Hickman* v. *Haynes*, L. R. 10 C. P. 598. For upwards of two months these creditors had personally, or through an agent other than the insolvent, the opportunity of ascertaining the value of their security; yet they do not appear to have taken the first step in that direction until the assignee refused to take the property. In ex parte *Downes*, 18 Vesey, 290, a mortgagee, on making a low valuation of the estate and electing to give up his mortgage, was admitted to prove, under a Commission of Bankruptcy, against the mortgagor. The estate was afterwards sold by the assignees for a much larger sum. The mortgagee presented a petition, praying to be at liberty to withdraw his proof and have the benefit of the mortgage. Lord Eldon said it was dangerous to allow a mortgagee to retract his election after having had the benefit of his proof, and dismissed the petition.

In the case of *ex parte Spicer*, 12 L. T. N. S. 55, it was held that a second mortgagee having elected to prove, and having proved his debt, was not entitled to have his proof expunged, as having been made through inadvertence, and to claim the balance of the purchase-money of the mortgaged premises in the hands of the trustees, and to receive the dividends upon the balance. Mr. Commissioner Goulburn says, "he cannot now, in common sense or in right, withdraw from the position [that is the proof claim and valuation of security] by alleging that it was done through inadvertence, and thus retrace his steps and go back to his former position as second mortgagee." Again, at page 56, he says, "It appears to me there is no pretence whatever for this demand. and that it would be perverting the whole object and purpose of this Statute if I were to allow any one to play fast and loose in this way, to prove first and then to come afterwards, when he finds that he might get more as second mortgagee, and say the proof was inadvertence." See also *Re Hurst*, 31 U. C. R. 116; *in re Hoare*, L. R. 18 Eq. 705. But it appears to me that this case can be put on a broader ground than this. Where, as here, without fraud on the part of the assignee, a second creditor makes proof of his claim, and places a value on his security, and invites the other creditors to pay him off at his own valuation and ten per centum additional on his security being accepted, it appears to me much like a statutory contract between the parties; so on the other hand, if the assignee declines to take the security, it should impose on the creditor a corresponding obligation to retain his security at the value he has placed upon it. A proposal on the one hand, and accepted or refused on the other, should have some legal effect. It should not, in the words of the high legal authority just quoted, allow either party to "play fast and loose." There may be circumstances in which it would be proper to allow such an application as this, but a very different case should be made out. If the assignee should be a party to a fraud (and I use the word in its broadest sense) on a secured creditor, or there should be a case clearly established of mutual mistake, which it would be contrary to every principle of justice to ignore, then I think the inherent jurisdiction of the Court could be invoked; but this case presents no such features. It does not appear that he who was acting for the petitioners, in making their proof and placing a value on the security, was not as well able to form an opinion as those who have since valued it. He may have been more san-

guine, and, perhaps, saw elements of value which those who have since seen it have been unable to discover. It would be difficult to say which was right.

If the property had increased in value and become of consequence to the assignee, the valuation here made would probably have satisfied those creditors, and when deficiency takes place (if it has here) then they should, on the other hand, be bound by the value which they deliberately placed on it. I can see nothing more in this case than an offer made in hopes of its being accepted, and when refused, an attempt made to get rid of its consequences. See the remarks of Bacon, C. J., at page 491 of 3 Chan. D., in the case of *In re Balbirnie, ex parte Jameson.*

The strictness with which the Courts have acted in refusing an amendment of a solicitor's bill of costs after it has become the subject of taxation affords not an inapt analogy to the case in hand, *Loveridge* v. *Botham*, 1 B. & P. 49; *Davis* v. *Dysart* (Earl), 25 L. J. Chan. 122, affirmed in appeal 25 L. J. Chan. 322, *In re Heather*, L. R. 5 Chan. 694. For these reasons I think the petition must be dismissed, but, as I am not satisfied that the assignee was as expeditious as he might have been in advising the petitioners' solicitor of his refusal to accept the security, and because the point is, under the Act, comparatively new, I don't think this a case for costs.

Petition dismissed, without costs.

UNITED STATES REPORTS.

SUPREME COURT OF OHIO.

Harner v. Dipple.

Contract by infant.

An undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at maturity, becomes a valid and enforceable contract.

[*American Law Register, Nov.* 1878.

Motion for leave to file a petition in error to the District Court of Clarke County.

The original action was brought by Dipple against Harner, on an undertaking for stay of execution, executed by the defendant during his minority. It appears that the defendant arrived at his majority before the period of stay expired, and that after the expiration of the stay he acknowledged his liability, and promised the plaintiff, to whom the undertaking was made, to pay the amount of the judgment stayed. Upon this state of facts judgment was rendered for the plaintiff in the Court of Common Pleas, which judgment was afterwards affirmed by the District Court.

To reverse these judgments leave was now asked to file a petition in error.

Spencer & Arthur, for the motion, cited: 1 Parsons on Contracts, 295; *Keane* v. *Boycott*, 2 H. Blackst. 511; Reeves' Domestic Relations, 378 n.; 2 Kent's Com. 236; 1 Mason, 32; Bingham on Infancy, 23; Swan's Treatise 601–2; *Baker* v. *Lovitt*, 6 Mass. 78; *Oliver* v. *Hondlet*, 13 Id. 237; *Whitney* v. *Dutch*. 14 Id. 457; *Boston Bank* v. *Chamberlain*, 15 Id. 220; *Chandler* v. *McKinney*, 6 Mich. 217; *Dunton* v. *Brown*, 31 Id. 182; 11 S. & R. 305; Tyler on Inf. and Cor. 42, 48; 54 Penna. St. 380; Story on Contracts, sect. 57; 10 Ohio, 127; 8 East, 331.

Keifer & White, contra, cited: Swain's Treatise, 601; *Tucker* v. *Moreland*, 10 Pet. 59; 1 Am. Lead. Ca. (5th ed.) 299, 300, 304, 306; *Cole* v. *Pennoyer*, 14 Ill. 160; *Curtin* v. *Patton*, 11 S. & R. 305, 310; *Hinley* v. *Margaritz*, 3 Barr. 428; *Patchin* v. *Cromach*, 13 Vt. 330; Tyler on Inf. 56-7; Bing. on Inf. 43, 44; *Vaughn* v. *Darr*, 20 Ark. 600; *Shropshire* v. *Burns*, 46 Ala. 108; *Williams* v. *Moore*, 11 M. & W. 256; 1 Pars. on Con. (6th ed.) *328, 329 and note b; *Thornton* v. *Illingworth*, 9 Eng. C. L. 256; *Gibbs* v. *Morrill*, 3 Taunt. 307; *Mason* v. *Denison*, 15 Wend. 71; *Conroe* v. *Birdsall*, 1 Johns. Cases, 127; *Ayers* v. *Hewitt*, 19 Me. 281; *Arnold* v. *Richmond Iron Works*, 1 Gray, 434; 2 Kent, 235, 247; *Roof* v. *Stafford*, 7 Cowen, 185; *Slocum* v. *Harker*, 13 Barb. 537; 3 Burr. 1804; *Fonda* v. *Van Horne*, 15 Wend. 631; *Fetrow* v. *Wiseman*, 40 Ind. 148; *Kline* v. *Beebe*, 6 Conn. 494; *Owen* v. *Long*, 112 Mass. 403.

The opinion of the Court was delivered by

McIlvane, J.—The question made is, was the undertaking sued on absolutely void, or

only voidable. If void, it was not subject to ratification; if voidable merely, it may be enforced after ratification.

Having considered this question upon principle, as well as upon authority, we are constrained to hold that the undertaking was voidable only, and that after ratification it became a valid and binding engagement.

In disposing of this case, we make no note of those principles which control cases where an infant, by reason of immaturity and natural incapacity, is, in fact, unable to assent to the terms of an alleged contract. When this undertaking was executed it contained every element of a valid contract, save only, that the party was under twenty-one years of age.

Except for necessaries, the law grants to infants immunity from liability on their contracts. This immunity is intended for their protection against imposition and imprudence, and is continued after majority as a mere personal privilege. This privilege of immunity, after majority, is not given because of the actual or supposed incapacity of an infant to enter into contracts intelligently and prudently. If actual incapacity existed, the privilege of infancy would not be needed for the purpose of defence. And it is contrary to our knowledge of human nature, that all infants are incapable of intelligently and prudently entering into engagements assuming burdens. It is a matter of favour intended as a shield and compensation for the want of that greater wisdom and prudence which time and experience usually teach.

But, whatever may have been the natural capacity of the infant, whenever he arrives at majority, a time fixed by an arbitrary rule, which, in the nature of things, can not affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence, the law imposes upon him full responsibility for all his acts and contracts.

In this new relation, it becomes his moral duty, and for its discharge he is invested with legal capacity to affirm and perform, or to disavow, at his election, all his previous contracts of imperfect obligation. Contracts for necessaries are of perfect obligation, and, therefore, he cannot disaffirm them. Contracts founded on illegal considerations are of no obligation, and therefore, may not be affirmed.

The appointment of an agent or attorney to make contracts is, perhaps, inconsistent and repugnant to the privilege of infancy, for the reason, among others that might be named, that it is imparting a power which the principal does not possess; that of performing valid acts. But, outside of these exceptions, which are based on special grounds, we see no reason why the power should be denied, to ratify any contract which, as an adult, he might originally make. The power of disaffirmance being co-extensive, it is all that is needed for his protection.

If, in the case before us, the ratification had been made by payment, instead of a promise to pay, its binding effect would not be doubted. Why, therefore, should not the promise to pay be binding also? There is no question about consideration. The consideration which supported the original promise is sufficient to support the ratifying promise. The only contention here is, that the original promise was void by reason of infancy, not from want of consideration. If, therefore, actual performance by payment would have been binding, so should the promise to perform; and this, too, without regard to the fact whether or not the infantile contract was beneficial or prejudicial. The principles of jurisprudence are not violated by the performance of a contract prejudicial to the party. Indeed, a person, *sui juris*, is as strongly obligated by his contracts prejudicial as by those beneficial to himself; and the same principle should apply where a person, *sui juris*, ratifies and confirms his contract of infancy.

The plaintiff in error, however, relies chiefly on the authority of decided cases, and claims the settled law to be that all contracts of an infant prejudicial to him are absolutely void, and that a contract of suretyship is of that class.

In Swan's late treatise, among contracts of infants which have been decided to be void, is mentioned that of suretyship; but the author, in speaking of the state of the authorities, pithily and truthfully remarks:

"What contracts of an infant are void, and what are merely voidable, nobody knows."

Keene v. *Boycott*, 2 H. Blackst. 511, decided in 1795, appears to be a leading case. The contract of an infant was held in that case to be voidable only; but in the opinion of Chief Justice Eyre a rule was stated wherein certain of such contracts are said to be void. The rule was thus stated: "When the court can pronounce the contract to be for the benefit of the infant, as for necessaries, it is good; when to his prejudice, it is void; and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of an infant." This rule, modified so as to declare that a contract *necessarily* prejudicial to the infant is void, has been adopted in many later cases, both in England and in this country. But the current of more recent decisions repudiates the distinction between void and voidable contracts on account of their beneficial or prejudicial nature, and holds them all to be voidable merely; and the more recent decisions of courts still adhering to the distinction, hold some contracts voidable only, which were before held to be void. Thus, in *Owen* v. *Long*, 112 Mass. 403, a surety contract was held to be voidable only, for the reason that such contract, as a matter of law, cannot be said to be necessarily prejudicial to the surety. Also, an account stated is held to be voidable only; *Williams* v. *Moor*, 11 M. & W. 255. Also, a conveyance by lease and release: *Zouch* v. *Parsons*, 3 Burr, 1794.

The following cases are to the effect that an infant's contract of suretyship is merely voidable, and may be ratified. They also show, with more or less force and directness, that the distinction between void and voidable contracts of infants, on the ground of benefit or prejudice, is not sound: *Curton* v. *Potton*, 11 S. & R. 305; *Hinely* v. *Margaritz*, 3 Barr. 428; *Gatchin* v. *Cromach*, 13 Ver. 330; *Vaughn* v. *Darr*, 20 Ark. 600; *Shropshire* v. *Burns*, 46 Ala. 108; *Williams* v. *Moor*, 11 M. & W. 256; *Fetrow* v. *Wiseman*, 40 Ind. 148; *Fonda* v. *Vanhorne*, 15 Wend. 631; *Scott* v. *Buchanan*, 2 Humph. 468; *Cole* v. *Pennoyer*, 14 Ill. 158; *Cummings* v. *Powell*, 8 Texas, 80; 1 J. J. Marshall, 236; *Mustard* v. *Wohford's Heirs*, 15 Gratt, 329.

In Massachusetts, where the doctrine was approved that the acts of an infant are void, which not only apparently but necessarily operate to his prejudice (*Oliver* v. *Clop*, 13 Mass. 237), it was afterwards said by Chief Justice Parker, in *Whitney* v. *Dutch*, 14 Mass. 457: "Perhaps it may be assumed as a principle, that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them when he has legal capacity to make a contract, they are in all respects, like contracts made by adults." And in 1840 (*Reed* v. *Batchelder*, 1 Metc. 559), Chief Justice Shaw said: "The question, what acts of an infant are voidable and what void, is not very definitely settled by the authorities, but in general it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them when he comes of age, as his own views of his interest may lead him to elect."

So that, Mr. Parsons, in his work on Contracts, vol. 1, p. 294, 6th ed., says: "The better opinion, however, as may be gathered from the later cases cited in our notes, seems to be that an infant's contracts are, none of them, or nearly none, absolutely void; that is, so far void that he cannot ratify them after he arrives at the age of legal majority."

In 1 American Leading Cases, 300, 5th ed., it is said: "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election," on arriving at majority. This rule has been quoted and approved 58 n 1 i. 14 Illt. and 15 Gratt. 329, and we think it embodies the better reason.

In the light of principle, therefore, as well as by the weight of the later authorities, the whole question should be thus resolved: The privilege of infancy is accorded for the protection of the infant from injury resulting from imposition by others or his own indiscretion. The object is fully accomplished by conferring on him the power to avoid his contracts, or, in other words, by giving him immunity from liability, until such contracts are ratified by himself after arriving at full age. And, again, that an adult, labouring under no disability, may perform his unexecuted contracts of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance, we think is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his own sense of right and duty, he should in law, as in morals, be bound to their performance.

Motion overruled.

REVIEWS.

A Manual of the Law of Landlord and Tenant. By Horace Smith, B.A., of the Inner Temple, and Horace Spooner Soden, M. A., of the Middle Temple, Barristers-at-Law. Second Edition. London: Davis & Son, 57 Carey St., Lincoln's Inn. R. Carswell, Toronto, 1878.

The first edition of this work was published in 1871, and was very favourably received by the profession in England, though but little known in this country. The ground plan was drawn out originally by Mr. Cave, Q. C., but, as he was unable to finish it, Messrs. Smith and Soden took it in hand and presented a very useful treatise, which takes its place between the large and expensive treatise of Woodfall (now appearing in a slightly abridged form in its eleventh edition, by Mr. Sely) and the sketchy lectures of Mr. J. W. Smith. The present volume is even a greater success than the previous one, much matter has been added, a part re-written, and a number of forms given, some of which are new to us and will be found of use in this country. We strongly recommend this compact and practical work to the notice of our readers.

FLOTSAM AND JETSAM.

God save the Queen.—On the evening of Coronation day of Her present Majesty, the Benchers of Lincoln's Inn gave the Students a dinner; when a certain wag, in giving out a verse of the National Anthem, which he was solicited to lead in a solo, took the opportunity of stating a grievance as to the modicum of port allowed, as follows:

> "Happy and glorious
> Three half pints 'mong four of us.
> Heaven send no more of us.
> God save the Queen."

which was sung by the full chorus amid shouts of laughter and applause.

"Lien."—Lord Eldon always pronounced the word, as though it were "lion," and Sir Arthur Pigott pronounced it "lean." On this Jekyll wrote the following epigram:

> "Sir Arthur! Sir Arthur what do you mean,"
> By saying the Chancellor's "lion" is "lean."
> Do you think that his kitchen's so bad as all that
> That nothing within it will ever grow fat?"

Rolls and Butter.—Lord John Russell endeavoured to persuade Lord Langdale to resign the permanent Mastership of the Rolls, for the uncertain position of Lord Chancellor; and paid the learned Lord very high compliments upon his talents and acquirements. "It is useless talking, my Lord" said Langdale, "so long as I enjoy the *Rolls*, I care nothing for your butter."

A County Judge in England, who had received his appointment, more on account of his political creed than of his ability, was surprised to find that an assistant judge had been appointed to his court. A friend asked Lord Westbury the reason for his creating another judge. The Chancellor replied, "we were afraid of leaving Mr. A— any longer *alone in the dark.*"

Law Society of Upper Canada.

OSGOODE HALL,

MICHAELMAS TERM, 42ND VICTORIÆ.

During this Term, the following gentlemen were called to the Bar; namely :—

Frederick Pimlott Betts
(Who passed his examination in Trinity Term).
William Barton Northrup.
James Albert Manning Aikins.
Edmund Lindsay Dickinson.
Albert Jeffrey.
Walter Macdonald.
Duncan Denis Riordan.
William Henry Best.
Thomas Rollo Slaght.
Bartle Edward Bull.
John Ball Dow.
Robert Hodge.

And the following gentlemen were admitted as Students of the Law and Articled Clerks, namely :—

Graduates.

John Henry D. Munson.
Henry Nason.
William Johnston.
John Fravers Lewis.
Albert John Wedd McMichael.

Matriculants.

Edmund Bell.
George Kappelle.
Ferguson James Dunbar.
Edmund Sweet.
Frederick A. Munson.
Harry O. Morphy.
James C. Fraser.

Juniors.

Arthur Alexander Webb.
John Christopher Delaney.
Thomas Carr Short.
Albert Edward Barber.
W. Taylour English.
F. X. Murphy.
Thomas H. Stoddart.
John Workman Berryman.
Wilmot Churchill Livingston.
Alexander W. Ambrose.
Samuel Thomas Hamilton.
John Soper McKay.
Abner E. Decow.
Wm. John Code.
John Edward Moberly.
Edmund Weld.
John Edward Bullen.
Robert W. Witherspoon.
Chauncey G. Jarvis.
Isaac N. Monk.
Edward W. M. Flock.
John M. Best.
Alexander Darrach.
Wm. Fred D. Mercer.
Joseph Braun Fisher.

Articled Clerk.

Wm. Edwin Sheridan Knowles.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II.; III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical analysis of a selected poem:—
1879.—Paradise Lost, Bb. I. and II.
1880.—Elegy in a Country Churchyard and The Traveller.
1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

[*Optional Subjects instead of Greek.*

FRENCH.

A Paper on Grammar.
Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.
Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR APRIL.

1. Tues..Bismarck born, 1815.
5. Sat....Canada discovered, 1499.
6. Sun...Palm Sunday.
7. Mon..County Court Terms begin. County Court sitt. without jury (ex York) begin.
8. Tues..Supreme Court Act assented to, 1875.
9. Wed..Surrender of Gen. Lee, 1865.
11. Fri....Good Friday.
12. Sat....County Court Term ends.
13. Sun...Easter Sunday.
14. Mon..Easter Monday.
15. Tues..Lincoln assassinated, 1865.
18. Fri....First newspaper published in America, 1704.
20. Sun...Low Sunday.
23. Wed...St. George's Day.
24. Thur..Earl Cathcart Gov.-Gen., 1846.
27. Sun...2nd after Easter. Queen Victoria proclaimed Empress of India, 1876.

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Canada Law Journal.

Toronto, April, 1879.

At the beginning of this year, case-law in the United States was represented by the immense number of 2,823 volumes of reported decisions.

The Government in England have brought in a Bill for the prosecution of offences. It provides for the appointment of an officer to be called the Solicitor for Public Prosecutions, who, under the direction of the Attorney-General, is to institute, undertake or carry on criminal proceedings. The rights of private prosecutors are not intended to be interfered with.

The research of Moncure Conway in his book on "Demonology" has brought to light a curious oddity in ancient Danish jurisprudence. He says it was an old-time custom in Denmark for Courts to sit with an open window, in order that the devil might easily fly off with the perjurer. It might be well to try the effect in modern law courts, especially in hot weather and during election trials, as we have no doubt it would tend to purify the administration of justice. There is a pathetic complaint of a Barrister in the London *Times* in which he suggests, "if ventilation is not to be granted to us when the Court is sitting, may we not have the windows and doors set open when the Court has risen?" So that till we have some more effectual method of exorcising the foul air of the law courts, it would be well to revive the old Danish practice.

It is satisfactory to learn that Mr. O'Brien has prepared a second edition of his useful work on the "Division

Courts Act." Having been favoured some little time since with some of the "copy," the writer of this note is in a position to speak of the exhaustive manner in which the subjects have been treated. The notes to most of the subjects have evidently been to a great extent re-written. It is in general a strong point in favour of a second edition of a book that the author is enabled, by a careful annotation during a course of years, to make each matter discussed more complete, both by correcting mistakes and supplying omissions. This, we learn, has been systematically done, and we have reason to think that the edition of Mr. O'Brien's book about to be issued, will be as much superior to the previous one as the later editions of Mr. Harrison's works were to his earlier ones. It will add largely to the value of the book that several of the most experienced County Judges have given valuable assistance in looking over the notes, and in giving suggestions as to a number of doubtful points.

The atmosphere of Maritime Courts in the United States, appears to have a very inspiriting effect upon the members of the profession who practise there. The following rather discursive eulogy we clip from an address of the Hon. Eli K. Price, welcoming the Hon. William Butler to a seat upon the Federal Bench and "to a jurisdiction extending around the globe."

"There is a history, a stir, and a life in the Maritime Law and Practice that exceed in interest those of all other branches of jurisprudence. Seamen and ships move ever on the unstable waters, and are moved by the forces of Nature. Skilfully the navigator must spread his sails to the winds, and watchfully guard the fires and steam that drive him onwards. The strife is with the elements; is with wind, water, fire, steam, and to strike the earth is its greatest danger. Sailors rejoice in the contest, and with all their faults they are to be kindly regarded; for without them Commerce cannot live, nor the nation have a navy for her defence; yet the master must be upheld in holding them to a stern discipline for the safety of ship, cargo, and all lives on board. In the memorable shipwreck on Melita, St. Paul had to say, 'Except these abide in the ship ye cannot be saved;' and every age has had the like experience."

MR. JUSTICE OSLER.

Many and rapid have been the changes lately in the *personnel* of the two Superior Courts of Common Law of the Province of Ontario, occasioned by the lamented death of Chief Justice Harrison, and by the removal of Mr. Justice Gwynne to Ottawa. The Common Pleas seems a different place altogether without the familiar face of its so long Chief, whilst the casual sightseer of a few years ago, going now to the Court of Queen's Bench, would see there faces, until lately, strangers in that room. Next term, the junior Court will witness another change, Mr. Featherston Osler taking the seat long filled by Mr. Galt, who now goes to the right of Chief Justice Wilson.

There were many rumours as to who the new judge would be, and many names were suggested; but it was only very shortly before his appointment that the name of the gentleman who now fills the office became prominent. Many who had not heard this suggestion, at first thought probably that some one more advanced in years, some older member of the Bar, some one better known to the public in political circles or on circuit, would receive the appointment; moreover Mr. Osler was not a Queen's Counsel—a strange omission, certainly, which has already been spoken of in this journal.

But though in these immaterial matters,

the appointment has been somewhat out of the usual course, there has been but one sentiment expressed both by the Bench, the Bar and the public, and that is one of entire approval. The selection is creditable to the Minister of Justice, and those who have advised him in the matter, and it is a fitting compliment to the profession, that one of the most honourable, upright, industrious, and learned of its members, should be chosen on his merits alone.

Mr. Osler is the eldest son of the Rev. Rural Dean Osler, now of Dundas, but for many years resident clergyman at Bond Head, in the County of Simcoe. He received his education, in part, at the excellent grammar school in Barrie, After leaving school, he entered the office of Patton, Bernard & Ardagh, where he was noted as a diligent and intelligent student, evincing that devotion to his profession, which has been a chief characteristic ever since. The writer, who was in the same office, well remembers the high opinion his masters, as well as his fellow-students, entertained for his studious industry and integrity of purpose. He subsequently came to Toronto, finishing his education in the office of the late Hon. John Hillyard Cameron. He was admitted as an Attorney in Michaelmas Term, 1859, and called to the Bar in Hilary Term, 1860. Mr. Osler was a Bencher of the Law Society, and was one of the most useful men in convocation.

When admitted to practice, he went into partnership with Hon. James Patton, who had then removed to Toronto. Mr. Thomas Moss, the present Chief Justice of the Court of Appeal, soon afterwards joined the firm, which was subsequently additionally strengthened by the late Chief Justice Harrison becoming the senior partner, in place of Mr. Patton. It is a circumstance worthy of record that all three members of the firm were within a few years raised to the Bench. There is another noticeable fact, that, for the first time, we believe, in Canada, a stuff gownsman has been appointed to the Superior Court Bench. This is not unknown in England, however, and there the result has been very satisfactory.

Mr. Osler, though his experience at Nisi Prius has not been very great, is known among his brethren as a most painstaking, well-grounded and thorough lawyer. We congratulate him upon his promotion, and predict for him a most useful judicial career.

COSTS WHEN A DEMURRABLE BILL GOES TO HEARING.

There is, apparently, some conflict between the later English and Canadian decisions upon the not unimportant question as to the awarding of costs in cases where a bill which might have been successfully demurred to has been answered instead, and is thereafter dismissed at the hearing. The general principle applicable to such matters is well expressed by the present Chancellor, in *McKinnon* v. *Anderson*, 18 Gr. 684: "Where there are two courses of procedure, one more expensive than the other, and the one that is the less expensive will serve the proper purposes of a party as well as that which is more expensive, and he yet chooses to take that course which is the more expensive, he is properly limited to the costs of that which is the less expensive." Indeed, in the earlier cases, the Court went beyond this equitable adjustment of costs, and deprived the defendant who failed to demur of all costs. Thus Jekyll, M.R., in *Tichburn* v. *Leigh*, 6 Vin. Abr. 365, pt. 14, laid it down that if a bill is brought for a matter properly determinable at law, the defendant ought to demur, and not suffer the cause to go

on to a hearing; and if the bill be dismissed upon hearing, the defendant shall not have costs, because it was his fault to let it proceed." In conformity with this doctrine is the decision of Lord Hardwicke, in *Earl Thanet* v. *Paterson*, Barnard, 247. And, in like manner, we find in the note to *Mitchell* v. *Baily*, 3 Madd. 62, that reference is made to a MS. case in 1749, where a bill to which the defendant might have demurred, but did not, was dismissed without costs, on the principle that unnecessary delay and expense were occasioned by the defendant's mode of defence. In *Hill* v. *Reardon*, 2 S. & S. 431, the bill involved a consideration of the jurisdiction of the Court upon a somewhat novel question, and the Master of the Rolls, on this ground, and because the defendants might have taken the opinion of the Court by demurrer, dismissed the bill at the hearing without costs. So in *Jones* v. *Davids*, 4 Russ. 277, the short question was whether the plaintiff could claim as a specialty creditor, and as the defendant neglected to have this question disposed of upon demurrer, which he could have effectually done, he was refused costs upon a dismissal of the bill. In *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492, the point in contest arose upon the construction of a will which was sufficiently presented in the bill, and no costs were given to a successful defendant who brought the case to a hearing instead of demurring.

The same views were entertained by Kindersley, V.C., who, in *Ernest* v. *Weiss*, 1 N.R. 189, dismissed the bill without costs, because the point on which he proceeded might have been raised by demurrer, and considerable expense saved thereby. To the same effect is *Webb* v. *England*, 29 Beav. 44, where the case was decided on the want of jurisdiction, and costs were refused, because it might have been equally well decided on demurrer. Again, where the plaintiff proceeded to interplead in a case in which, according to the rule of the Court, he was not entitled so to do, and the defendant, instead of demurring, came to interplead, the Court allowed each party to bear his own costs: *Cook* v. *Earl of Rosslyn*, 1 Giff. 167.

The rule of decision was somewhat modified in *Godfrey* v. *Tucker*, 33 Beav. 280, where Lord Romilly gave costs to about the same extent as if the objection had been taken by demurrer, although it would seem in that case the point on which the plaintiff failed was raised neither by demurrer nor by the answer. In *Nesbitt* v. *Berridge*, 32 Beav. 282, it was held that, though the bill contained charges of fraud against a defendant, he was not for that reason entitled to answer, if the bill was demurrable, and the Master of the Rolls refused costs where the defendant in such a case neglected to demur. This decision was followed by Mowat, V.C. in *Saunders* v. *Stull*, 18 Gr. 590.

After this current of decisions, all setting in the same direction, one is somewhat surprised to come across the views of Lord Justice James, in *Bush* v. *Trowbridge Water-Works Company*, L.R. 10 Ch. 461. He says: "I know of no rule that a defendant is obliged to demur, and run the risk that something may be picked out of the bill which will be enough to maintain it. If the plaintiff files his bill, and fails, he must pay the costs." The Lord Justice however goes on to explain the *ratio decidendi* of some of the older cases which were cited by saying: "A great many cases have been referred to where the Court was of opinion that there was some technical objection, or that there was some other point which might have been raised, and ought to have been raised, if the parties had acted reasonably by way of simple demurrer, which would have rendered the continu-

ance of the suit unnecessary, and the Court may take that into consideration in dealing with the costs of the suit." *Ib.* p. 463.

In *Pearce* v. *Watts*, L.R. 20 Eq. 492, Sir George Jessel (whose decision as to costs, in *Bush* v. *Trowbridge*, L.R. 19 Eq. 291, had been affirmed in appeal by the Lords Justices) dealt again with the same question in his usual incisive style: "It is urged," he said, "that the defendant might have demurred, and not having done so, is only entitled to such costs as he would have had in case he had demurred, and not to have the costs of the whole proceedings paid by the plaintiff. It seems to me, however, that the same principles ought to apply to a suit in this Court as to an action at common law. In an action at common law, the defendant may object to the form of the declaration, although all the witnesses are summoned, and if the objection be sustained, may sign judgment, and have the whole of the costs. This ought to be the rule here, and, in fact, was held to be the rule by the Lords Justices in the recent case of *Bush* v. *Trowbridge*." We are disposed to think that the Master of the Rolls here extends the principle of the decision of the case in appeal beyond its legitimate scope. The Lords Justices did not lay down a hard-and-fast rule, such as is indicated by Sir George Jessel. The true scope of the decision is, we think, given by the Chancellor, in the late case of *Gildersleeve* v. *Cowan*, 25 Gr. 460, where he is thus reported: "The case before the Lords Justices is an authority that it is not in every case where a bill may be demurrable and a party answers, and the bill is dismissed at the hearing, it must be dismissed without costs; but, on the other hand, it is not an authority that in a simple case where the bill is clearly demurrable, and a defendant answers, and the bill is dismissed at the hearing, it will not be dismissed without costs."

It is worthy of observation that the same points as are involved in *Bush* v. *Trowbridge* and *Gildersleeve* v. *Cowan*, were fully argued and elaborately adjudicated upon in the early case of *Simpson* v. *Grant*, 5 Gr. 273, which is not cited in the later decisions in the Ontario Court of Chancery. There the majority of the Judges lay it down that the authorities are all explicable on this principle, that parties are not permitted to adopt a tedious and expensive mode of procedure when an expeditious and inexpensive one is open, and would be equally effective. It is there said that nothing in the authorities warrants the proposition that when a bill presents numerous issues of law and fact, the defendant contesting the issues of law is bound, at the peril of costs, to have these issues disposed of on demurrer; but that all the cases tend to shew that, in a plain case, when all the questions can be effectually disposed of on demurrer, a defendant is bound to adopt that course, at the peril of costs. This case is worthy of being studied, and of being compared with the decision in *Bush* v. *Trowbridge*; and we venture to assert that it will be found that the principles enunciated in both cases are identical.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From Q. B.] [March 10.

PARSONS v. THE CITIZEN'S INSURANCE COMPANY.

Insurance—Statutory conditions—R. S. O. c. 162—Powers of Provincial Legislature.

The policy sued on, which was issued by the defendants who were incorporated since

the passing of R. S. O. c. 162, by the Dominion Parliament, had not indorsed upon it the statutory conditions referred to in the Schedule to the above Act, but had conditions of its own which were not made as variations in the mode indicated by the Act.

Held, affirming the judgment of the Court of Queen's Bench, that the defendants could not resort to their own conditions avoiding the policy for non-disclosure of a previous insurance by reason of such non-compliance, nor to the statutory conditions inasmuch as they were not printed on the policy.

Held, also, that a person insured under such a policy is entitled to avail himself of any statutory conditions in his favour, notwithstanding that it is not printed upon it, but the assurers are only entitled to avail themselves of such conditions, when they have them printed upon their policy.

Held, also, that R. S. O. c. 162 was not *ultra vires* as the Legislature of Ontario has power to deal with an Insurance Company incorporated by the Dominion Parliament in reference to insurances effected in Ontario.

Robinson, Q. C., for the appellant.

M. McCarthy, for the respondent.

Appeal dismissed.

From Chy.] [March 10

PETERKIN v. MCFARLANE ET AL.

Purchase for value without notice—Registration—A. J. Act, sec. 50.

The bill, which was filed against McF., R., McK., and B., alleged that a deed made by the plaintiff and her husband in 1866 to McF., although absolute in form, was made only as security for a loan of $500 from McF. to plaintiff; that McF. sold to R. and M., who took with notice of the plaintiff's right to redeem; that R. and M. sold the land to B., who took with notice, and that B. gave a mortgage back, to secure part of the purchase money, which was not paid up. The defendant, B., who was the only appellant, admitted by his answer the alleged character of the conveyance from the plaintiff to McF., and that the sale by McF. to R. and M. was in fraud of the plaintiff; but he denied notice of the plaintiff's claim, and alleged that he was a purchaser for value without notice.

At the hearing, B., who was the only appellant, made an application for leave to file a supplemental answer, setting the up facts shewn by the evidence that his deed from R. and M., and their deed from McF., as well as his deed from the plaintiff, had been duly registered, which was refused.

A decree was made declaring that the conveyance to McF. was only as security for the repayment of the $500; that R. and M. bought with actual notice of the plaintiff's claim, and that B. bought from them with actual notice.

It did not appear whether the decision was on the ground B. had actual notice when he purchased, or that B., not having paid his purchase money, was affected by notice, although not received till the filing of the bill.

Held (Proudfoot, V.C., dissenting), that the evidence did not shew that B. had notice of the plaintiff's claim when he purchased; that the amendment should have been allowed, and that this Court had power now to allow it under the A. J. Act, sec. 50; but as it would not be proper to conclude the proof without an opportunity of producing further evidence, the case was sent down for another hearing.

C. Moss for the plaintiff.

Boyd, Q.C., for the respondent.

Appeal allowed, without costs. The costs of the hearing, and subsequent proceedings up to the entry of the decree, to abide the event.

From C.P.] [March 10.

LAWRENCE v. KETCHUM.

Will—Description—Parol evidence.

The testator, who made his will in 1866, amongst other devises, bequeathed "all my real estate situated in the Township of Mono, in the County of Simcoe." It appeared that he had purchased lots 1 and 2 in the Township of Mono, in the County of Simcoe, in 1862, in 1863 Orangeville was incorporated as a village and annexed to the County of Wellington, lot No. 1

being detached from Mono, and comprised within Orangeville.

Held, affirming the judgment of the Common Pleas, that lot 2, which exactly fitted the devise, alone passed thereunder; and that parol evidence was inadmissable to show that the testator intended to include lot 1.

M. C. Cameron, Q.C., and *C. Robinson*, Q.C., for the appellants.

Bethune, Q.C., and *Beaty*, Q.C., for the respondent.

Appeal dismissed.

From Q.B.] [March 10.

Ulrich v. National Insurance Company.

Insurance Co.—Reference to Arbitration—Pleading.

In an action on a policy of insurance, the defendants, amongst other pleas, pleaded that the policy was subject to a condition, that in case differences should arise, touching any loss or damage after proof had been received in due form, the matter should, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the Company under the policy; and that no suit or action against the Company for the recovery of any claim by virtue of the policy should be sustainable in any Court of law or Chancery, until after an award had been obtained, fixing the amount of the claim in manner therein provided, and averring that before the suit differences did arise, touching the plaintiff's alleged loss or damage, but the same had not been submitted to impartial arbitrators, nor was any reward of arbitrators fixing the amount of the plaintiff's claim under the policy, by reason of the alleged loss or damage made, before the commencement of the suit.

There was no averment of a written request to refer the dispute.

The plaintiff took no exception to the plea. At the trial the facts alleged in the plea were established, and the Judge directed a verdict for the defendants upon this plea, as a matter of law. The evidence was that no written request was made to refer.

Held, that the plea was clearly bad in omitting to allege such request, but that the plaintiff was not entitled to judgment, *non abstante veredicto*, for the defect would be cured by the verdict, as the written request might have appeared in evidence, but under R. S. O., cap. 50, sec. 129, the Court were at liberty to consider the whole case as disclosed by the evidence, without embarrassment from any defect in the statement of it upon the record, and a verdict must be entered for the plaintiff.

Ferguson, Q.C., for the appellants.

McMichael, Q.C., for the respondent.

Appeal dismissed.

From Chy.] [March 10.

Curry v. Curry.

Statute of Frauds—Parol evidence.

The Bill sought an account of the rents and purchase money received by the defendant upon the lease and sale of lot 18, containing 100 acres of land, which it alleged that the plaintiff's father (now dead) and the defendant, his brother, were jointly interested. It appeared that the deceased had for years assisted the defendant in improving and cultivating this lot, on which they lived. The defendant had spoken of his brother having a deed of 50 acres of the place on which he lived. It was shewn that the defendant, who had the fee of the whole lot, had, in 1850, made a deed to his brother of some land, which the plaintiffs insisted was 50 acres of this lot; but this deed could not be produced, owing to its either having been lost or destroyed. The defendant denied this, but he admitted having given his brother a deed of the adjoining lot 17 for the purpose of enabling him to vote. Lot 17 contained 120 acres, and the defendant's only interest in it was, that the person from whom he purchased lot 18 had accidently cleared a few acres on it, and the Inspector of Clergy Reserves reported that he claimed the lot, but he was never recognized as a purchaser, and never made any payment on account of the land. The deed to the deceased had never been registered, so that he might escape having his interest in the land made available to satisfy a verdict in a suit brought against him. In 1856 the defendant made a lease of lots 17

and 18 to F, which transaction was negotiated by the deceased, and in 1875 the defendant sold lot 18 to F, with his concurrence. The defendant swore that the deceased had never made any claim to the rent, and denied the whole case attempted to be made by the plaintiffs, but his evidence was not consistent.

Held, affirming the judgment of Spragge, C., that the evidence shewed that the deceased was the owner of half of lot 18, and that the plaintiffs were entitled to an account.

Maclennan, Q.C., for the appellants.

Blake, Q.C., (*Garrow* with him) for the respondents.

Appeal dismissed.

QUEEN'S BENCH.

IN BANCO, HILARY TERM.
MARCH 8, 1879.

IN RE CENTRE WELLINGTON ELECTION.

Parliamentary Election—Recount of Votes under 41 Vic. chap. 6, sec. 14—Mandamus to Junior Judge of County—Jurisdiction.

The Court refused a mandamus to the Junior Judge of the County of Wellington to proceed with the recount of votes under 41 Vic. chap. 6. sec. 14, as being a matter not within its jurisdiction, but belonging to Parliament alone.

Maclennan, Q.C., for applicant.

McMichael, Q.C., *contra.*

SOWDEN v. STANDARD INS. CO.

Insurance—Agent of Company acting for insured—Misdescription of premises—Right to recover—Statutory condition.

At the foot of an application for insurance, above the signature of the applicant, it was among other things expressly agreed, declared and warranted that if the agent of the Company filled up the application, he should in that case be the agent of the applicant and not that of the Company. The agent filled up the plaintiff's application in this case and in doing so unintentionally misdescribed the building insured in a particular, as found by jury, material to the risk:

Held, Armour, J, dissenting, that the plaintiff could not recover.

Held, also, that the above provision as to the agent was not in the nature of a condition requiring to be endorsed as a variation on the policy.

H. Cameron, Q. C., for plaintiff.

Bethune, Q. C., *contra.*

WHEELDON v. MILLIGAN.

Husband and wife—Authority of wife to bind husband.

Plaintiff, being indebted to defendant for rent and otherwise, left the country with the intention of going to Manitoba. On his way he wrote the following letter to his wife: "As regards Mr. Milligan's affairs, I wish you to do the best way you can: but tell Mr. Milligan not to be afraid of me. I will see him all right. Now if Mr. Milligan will do the thing that is square that is all right; but I hope he will be a friend to you and I will be the same to him." On receipt of this letter plaintiff's wife sold his chattels at a valuation to defendant, and executed a surrender to him of the demised premises, of which defendant then resumed possession. Plaintiff returned in four or five weeks after his departure and sued defendant in trespass thereon, as also on the covenant for quiet enjoyment contained in the lease of the premises in question, but,

Held, that he could not recover, for that coupled with the evidence set out in the case the letter to his wife clothed her with authority to part with the property and surrender the premises to defendant.

McFadyen, for plaintiff.

Masson, for defendant.

BALLAGH v. ROYAL MUTUAL ASS. CO.

Insurance—Statutory conditions—Variations—Reasonableness of condition.

Under the statutory conditions endorsed on a policy of insurance were printed, in different coloured ink, but in the same sized type, the words prescribed by sec. 4 of ch. 162, R. S. O. Then followed in much larger type and in the same coloured ink, the words, "additional conditions," and below this heading the following condition: "In

case any promissory note for a cash premium or for any payment or assessment on any premium note * * given to the Company or to any officer or agent, be not paid when due the policy * * shall be null and void, and the Company shall not be liable for any loss occurring before or after the maturity of such note:

Held, Armour, J., dissenting, that the statute had been sufficiently complied with as to the additional condition, which was sufficiently indicated and set forth so as to be binding upon the assured,

Held, Armour, J., dissenting, also, that that the condition was not an unreasonable one.

Robinson, Q. C., for plaintiff.

Bethune, Q. C., *contra*.

Regina v. College of Physicians and Surgeons of Ontario.

In Re John McConnell.

Medical practitioner—Conviction for felony—Erasure of name from register of physicians—37 Vic. ch. 30, ss. 34, 39—Mandamus to restore.

One C. was convicted in 1869 of manslaughter and sentenced to five years' imprisonment in the Penitentiary. Before its expiration his sentence was remitted, and in 1874 he applied to defendants for registration, and was duly admitted and placed upon the register as a bachelor of medicine. At the time of the application for registration the Secretary was not aware of the conviction, nor did he ask the applicant any questions. Subsequently on ascertaining the fact, under direction of the defendants, and without notice to C. the Secretary erased his name from the register.

Held, that C. had been guilty of no false or fraudulent representation within 37 Vict ch. 30, sec. 39, O.

Held, also that C's. case was not within sec. 34 of the same Act which referred to the conviction for felony of a person already registered, as C. had been registered without fraud or misrepresentation after the whole period of punishment had elapsed. A mandamus was therefore granted to restore his name to the register.

Robinson, Q. C. for applicant.

Kingsmill, *contra*.

Grand Hotel Co. v. Cross.

Custom—Right to drink waters of spring—Highway—By-law.

Where the land in question had only been granted by the Crown less than half a century,

Held, that there could be no custom established to drink the waters of a spring situate thereon.

The road leading to the spring had been closed by the Township Council by by-law in 1858, and another road laid out instead.

Held, *per* Hagarty, C.J., on the evidence set out in this case, that since that time the former road was not a public highway, but merely used for the convenience of persons frequenting the spring or the hotel and grounds connected therewith.

Held, also, *per* Hagarty, C. J., that the Court ought not after the lapse of so long a time to entertain objections against the by-law closing the road in question.

Per Armour, J., that the by-law in question had no effect to take away the character of the road as a highway.

C Robinson, Q.C., for plaintiffs.

Bethune, Q.C., and *Cross* for defendant.

Allen v. McQuarrie.

Action against Justice of Peace—Notice of action—Bona fides.

Held, in an action against a Justice of the Peace, where no notice of action is given, that a plaintiff in such action is entitled to have submitted to the jury, the question whether the defendant acted *bona fide*, or with colour of reason, in the act complained of, so as to entitle him to a notice of action under R. S. O. c. 73.

Hodgins, Q.C., for plaintiff.

Osler, *contra*.

O'Sullivan v. Victoria Ry. Co.

Master and servant—Negligence.

Plaintiff, an employee of defendants, was sent by the foreman of the works to exca-

vate earth from a bank below, while others were loosening it from above Whilst so engaged, a quantity of earth fell down upon him and broke his leg.

Held, that defendants were not liable, and a nonsuit was ordered to be entered.

H. Cameron, Q.C., and *Martin* for plaintiff.

Kerr, Q.C., and *Barrow*, *contra*

SUPERIOR LOAN AND SAVING SOCIETY v. LUCAS.

Mortgagor and mortgagee—Reformation of mortgage—Absence of redemise clause—Ejectment.

Defendant applied to plaintiffs, a money-lending company, for a loan of $2000, and was shewn by their manager a circular and loan table, the former declaring that the loan table was for the inspection of all, rendering borrowers free from the possibility of extortion, deception or fraud, *the loans being made at a fixed and uniform rate*, etc. The loan table shewed that the amount payable quarterly for 20 years on a loan of $1,000 was $26.85, defendant then signed an application for $2,000 repayable in 20 years quarterly according to the defendant's scale of repayments. This application was submitted to and passed by the board of directors, the manager then endorsed upon the application the quarterly repayment at $57.60 instead of $53.70, and sent it to the solicitors of the company who prepared a mortgage accordingly, for defendant's execution, and defendant executed it supposing it to be correct. The manager swore that he had told defendant the quarterly payment would be $57.60, but at the same time admitted that he had not informed him that the amount differed from the loan table, while the defendant positively denied the manager's statement. Defendant paid the first quarterly payment under the impression that it was correct, and the second was paid for him by one of the company's directors, but the third payment defendant refused to pay, when the plaintiffs brought ejectment; but

Held, that they could not recover, but that the mortgage must be reformed.

The mortgage contained no redemise clause, but the Court considering it beyond doubt both from the terms of the mortgage and the rules and regulations of the company that it was the intention of both parties defendant should retain possession until default, and there being in their opinion no default, refused to give effect to the objection that the estate was absolute in plaintiffs—and that they were therefore in any event entitled to possession.

COMMON PLEAS.

VACATION COURT.

FEBRUARY 21.

KELLY v. EARL.

Action for goods sold and delivered—Sale of liquors to persons accustomed to sell without license—Pleading—Evidence.

This was a special case submitted by an arbitrator for the opinion of the Court, under the terms of an order of reference, by consent of the parties.

The action was on the common counts for goods sold and delivered, to which, amongst other pleas pleaded, was the following one, allowed to be added by the arbitrator: that as to so much of the plaintiff's declaration as is for intoxicating liquors furnished after the month of August, 1876, the defendant says that he was not the holder of a license authorizing him to sell spirituous and malt liquors, but was accustomed to sell and did sell such liquors without license; and the plaintiff, well knowing that the defendant was so selling illegally, and with the intention of aiding and enabling the defendant to carry on such illegal traffic as aforesaid, sold to the defendant large quantities of spirituous and malt liquors, which liquors are part of the goods for the price of which the plaintiff seeks to recover in this action. The arbitrator found, that subsequent to such month of August, while defendant was not the holder of such license, but was accustomed to and did sell such liquors without license, the plaintiff knowing that the defendant was so accustomed to sell such liquors without license, sold to the defendant intoxicating liquors to the value of

$224.65, which said amount formed part of the plaintiff's claim.

Held, by Cameron, J., that the defence failed: that the plea was bad, in that it did not aver that the defendant was not one of the class of persons authorized to sell liquors without license, to wit, a druggist, who, under certain restrictions, may so sell; while the facts found did not go even so far as the plea, as it was not found that the liquors were to be sold by defendant, but it may have been merely for his own consumption.

C. Durand, for the plaintiff.
Winchester, for the defendant.

March 4.

The Ontario Copper Lightning Rod Company v. Hewitt.

Insolvency—Composition obtained by fraud—Action for deceit—Sufficiency—Pleading.

A declaration alleged that defendant was indebted to plaintiffs in a large sum of money, to wit, etc., besides the costs of a suit to recover same, and defendant fraudulently represented to plaintiffs that he was insolvent, and unable, by reason of the insufficiency of his assets, to pay said indebtedness in full, and by so representing induced plaintiffs to take a composition in respect of said debt and costs, whereas defendant was not insolvent, etc., whereby plaintiffs lost the difference, etc., and were put to costs in arranging the composition.

Held by Cameron, J., that it was no objection to the declaration that it did not aver that defendant knew he was not insolvent, because it charged the representation to be fraudulent; but that the declaration was bad because no damage was shewn; for if the plaintiffs were induced to take a less sum through the defendant's fraud the original cause of action still existed and plaintiffs could proceed with their former action.

B. B. Osler, Q.C., for the plaintiffs.
Dr. Spencer, for the defendant.

IN BANCO, HILARY TERM.

March 7.

Churchill v. Denham

Replevin Bond—Delay in proceeding—Damages.

In an action for breach of a replevin bond for not prosecuting the replevin suit without delay, the plaintiff at the trial was awarded, as damages, the amount of the rent distrained for. On motion in term on the defendants undertaking to bring the replevin suit down to trial at the next assizes, the damages were reduced to a nominal sum.

J. A. Proctor, for the plaintiff.
J. B. Clarke, for the defendant.

The Great Western Railway Company v. Hodgson.

Replevin—Property passing—Warehouse receipt, Validity of.

This was an action of replevin to try the question of the property in a quantity of pork and lard, the produce of certain hogs which had been taken out of the possession of the plaintiffs who were holding the same to the order of a firm in Chicago.

Held on the evidence set out in the case that the property had never passed out of the plaintiffs, and that they were therefore entitled to maintain the action.

A question was also raised as to the effect of a warehouse receipt given by a firm of packers and curers of pork, which, under the circumstances of this case, was held to be invalid.

Robinson, Q. C., for the plaintiff.
McMahon, Q. C., for the defendant.

McQueen v. Phœnix Mutual Insurance Company.

Insurance—Interim receipt—Necessity of endorsment thereon of asignment of property—Releases.

An interim receipt on a stock of goods was made, subject to the conditions of the defendant's printed form of policy then in use, one of which conditions was that, "if the property insured is assigned without written permission endorsed thereon by the agent of the company, duly authorized for such purpose, the policy shall hereby become void." After the insurance was effected, the plaintiff assigned the insured property to one M. in trust for the plaintiff's creditors. The

policy did not issue until after the fire. It appeared that when the assignment was made the defendant's agent was expressly notified thereof, and assented thereto, and stated that no notice to the company was necessary.

Held, that under the above condition, such endorsation should be made on the interim receipt; but that the agent, as he had the power to do, had waived it.

In an action on the policy, the plaintiff alleged that, after the payment of the creditors' claims, there would be a surplus coming to him, and he sued for the amount of the policy in trust for the creditors as for himself individually.

Held, that on producing releases from all the necessary parties of their claims, the plaintiff was to have judgment entered in his favour.

Robinson, Q.C., for the plaintiff.

Foster and *J. B. Clarke*, for the defendant

Britton v. Knight.

Lease to husband and wife for life—Acceptance by wife—Evidence.

S. S., the owner of certain land, arranged with his son T. S. to convey the land to him in consideration of the payment by him of certain moneys for S. S., and his forthwith reconveying the same to S. S. and his wife for their natural lives. The conveyance to the son, and his reconveyance of the life estate to S. S. and his wife was respectively executed. Subsequently S. S. and T. S. executed a mortgage of the land to the plaintiff, and after S. S.'s death the plaintiff brought ejectment against the widow of S. S. and two other defendants, her tenants. It was argued that the arrangement was never carried out, and that it was repudiated by the wife, and that she refused to accept the life estate.

Held, that the evidence shewed that the arrangement had been perfected, and that, even if a repudiation by the wife during her husband's lifetime would have any effect, the evidence failed to establish it; and that on the husband's death she asserted her right to the life lease, and now defends under it.

Held, therefore, that the plaintiff could not recover.

Osler, for the plaintiff.

McMichael, Q.C., for the defendant.

Black v. Coleman.

Excessive distress—Special damage—Married women—Separate property.—C. S. U. C., ch. 73, sec. 2.

Held, that there may be a recovery in an action for an excessive distress without proof of special damage.

Quære, whether C. S. U. C. ch. 73, sec. 2, applies to property acquired by a married woman after the 4th May, 1859, who was married prior thereto.

J. E. Macdougall, for the plaintiff.

J. E. Ross, for the defendant.

McCarthy v. Arbuckle.

Identity of deed—Conveyance after marriage in pursuance of prior parol agreement—Sufficiency of—Registry Act, 1865, sec. 62—Construction of—Lien for improvements.

In an action of ejectment, the plaintiff claimed under a deed from the patentee of the Crown to his father. The deed was not produced at the trial, but it was held that the evidence, set out in this case, sufficiently proved its existence and subsequent destruction by fire.

Where a deed of a wife's land was made to her husband after marriage, in pursuance of a parol contract therefor entered into prior to the marriage: *Held*, that this would not constitute the husband a purchaser for valuable consideration of such land.

Per Galt, J. Since the Registry Act of 1865, 29 Vic., ch. 24, sec. 62, a person claiming under an unregistered title from the patentee of the Crown, must register his title so as to protect himself against any subsequent deed or mortgage made for valuable consideration.

In this case the defendant claimed a lien for his improvements on the land.

Held, that the evidence shewed that at the time the defendant made the improvements, he did so under the belief that the

land was his own, so as to entitle him to such lien.

Snelling, for the plaintiff.

McMichael, Q.C., for the defendant.

DENMARK v. MCCONAGHY.

Case commenced with jury—Right to continue without jury—Title by possession—Evidence of—Trespass.

Where the trial of a cause begins and is entered into with or without a jury, it must be finished in that manner, unless the change in that mode of trial is made by consent of parties.

In an action of trespass to land, in which the plaintiff claimed, under the paper title, and the defendant by possession, after the trial of the case had been entered into with a jury, the learned Judge ordered the jury to be discharged, and then tried the case without a jury; and the counsel for the parties, though objecting to the change, continued to act without further objection.

Held, that the learned Judge had no authority to discharge the jury, but that by the counsel continuing to act in the case, the objection had been waived.

On the merits, the verdict was entered for the defendants, the Court being of opinion that the possessory title had been proved.

Robinson, Q.C., for the plaintiff.

Ferguson, Q.C., for the defendants.

TUFFTS v. MOTTASHED.

Goods—Property passing—Replevin.

T. delivered certain articles to C. on the terms of a special contract contained in four notes signed by C., which were similar in form and as follows: "For value received, November 1, 1877, after date, we promise to pay to the order of T. $81.67. The consideration of this and the other notes is one artic apparatus, &c., which we have received of said T. Nevertheless, it is understood and agreed between us and T. that the title to the above mentioned property does not pass to us, and that until all such notes are paid the title to the aforesaid property shall remain in said T., who shall have the right in case of nonpayment at maturity, of either of said notes without process of law, to enter and retake and may re-enter and retake immediate possession of the said property wherever it may be, and resume the same. Payable at the Bank of Montreal here, &c." It appeared that C., without payment of the notes, sold the articles to the defendant, who was not aware when he bought that T. had any claim on them, but, on subsequently discovering it, offered to make a new bargain with T., but none was made. There was no demand and refusal of the articles. T. brought replevin, to which the defendant pleaded, (1) non *cepit*, and (2) that the goods were the defendant's and not the plaintiff's.

Held, that there must be a verdict for the defendant on the first issue, for that the goods came lawfully into the defendant's possession, so that without a demand and refusal trespass and trover would not lie, and, therefore, replevin; but that the plaintiff was entitled to a verdict on the second issue, as under the terms of the notes, the property in the articles was in the plaintiff.

Dougall (of Belleville), for the plaintiff.

Burdett, for the defendant.

CONSOLIDATED BANK v. HENDERSON.

Husband and wife—Note made by wife to husband—Endorsement by husband to plaintiffs for value—Liability of wife's separate estate.

A married woman, married after 2nd March, 1872, made a promissory note to her husband for his accommodation, which the husband endorsed for value to the plaintiffs. It was admitted that the wife had separate estate, and that she made the contract in reference thereto.

Held, that the plaintiffs were entitled to recover judgment against such separate estate.

Semble, per WILSON, C. J., that the judgment is not limited to the separate estate, but may be recovered against the married woman personally.

R. Martin, Q.C., for the plaintiffs.

Mackelcan, Q.C., for the defendant.

McGugan v. Manufacturers', &c. Mutual Ins. Co.

Insurance—Incumbrances—Assessment—Acceptance of note in payment of.

In an application for insurance on a saw mill, in answer to the question as the incumbrances, the applicant answered that the property was mortgaged to $500. It appeared that there was an additional mortgage thereon of $1,000, and that this application was one of three applications for insurance in the defendant's company, made at the same time and constituting one transaction, from which other applications the company were expressly informed of the existence of the mortgage in question.

Held, that under these circumstances the applicant could not be said to have omitted to have made known the existence of the mortgage in question.

For an assessment made on the insured's premium note, he gave defendants a note of himself and another person, which, it was contended, was accepted by the company in payment of such assessment, but held that the evidence shewed that the note was so received, but merely as a suspension of the debt during its currency.

Coyne (St. Thomas), for the plaintiff.

Ferguson, Q.C., for the defendants.

Miller v. Reid.

Insolvency—Action to recover money paid within thirty days of insolvency.

This was an action by plaintiff as assignee in insolvency of one A. to recover the amount of two promissory notes made by A., and paid by R. out of, as was alleged, money belonging to the insolvent, within thirty days before the insolvency, the defendant then being a creditor of A. and knowing his inability to pay his liabilities in full. At the trial the learned Judge found that the money was money belonging to R., &c., and he entered a verdict for the plaintiff. On motion in term to enter the verdict for the defendant, Wilson, C. J., was of opinion that on the evidence the verdict was right, and should not be disturbed, while Galt, J., was of opinion that the evidence shewed that the money was paid by R. under his personal undertaking to that effect, and that the verdict, therefore, should be entered for the defendant. The Court being equally divided, the verdict stood.

Walker (of Hamilton), for the plaintiff.

Mackelcan, Q.C., for the defendant.

Gauthier v. Canadian Mutual Ins. Co.

Insurance — Description — Warranty — Liquor sold on insured premises.

In a policy of insurance, certain premises were described as a two-story brick building, &c., occupied as a tenement dwelling. By a memorandum afterwards endorsed on the policy, the building was allowed to be "occupied as a refreshment room. No liquor sold." The policy was for a year, but was renewed by a renewal recept issued under sec. 32 of the Mutual Insurance Act. The building was occupied by a tenant of the plaintiff, and it was proved that liquor was sold in the building by the occupant, but without the plaintiff's knowledge or consent.

Held, that on renewal the memorandum became part of the description and binding as insured as a warranty that no liquor should be sold, and as liquor was sold the policy was avoided.

Robinson, Q.C., for the plaintiff.

Mackelcan, Q.C., and *Duff*, for the defendants.

Sly v. Ottawa Agricultural Ins. Co.

Insurance—Value of building—Misrepresentation of material fact—Avoidance of policy.

One of the statutory conditions endorsed on a policy of insurance provided that, "If the person insuring his buildings shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect of the property in regard to which the misrepresentation is made."

In the application for insurance in this case, the plaintiff stated that the estimated cash value of the building offered for insurance was $900, and obtained an insurance

thereon of $600. The jury found the buildings to be only worth $450.

Held, that the value of the buildings was a fact material to be made known to the defendants, and there being a misrepresentation of such fact, the insurance was avoided.

Smythe (Kingston), for the plaintiff.

J. K. Kerr, Q.C., for the defendants.

RYAN v. RYAN.

Statute of limitations—Possession as caretaker or agent—Subsequent entry of owner—evidence.

The plaintiff's father, who lived in the Township of Tecumseth, owned a block of 200 acres of land, consisting respectively of Lot 1 in the 13th and 14th concessions of the Township of Wellesley. In 1848, the father having offered plaintiff his choice of 100 acres of the block if he would live thereon and take care of the rest of the block, the plaintiff selected the south half of Lot 1 in the 13th concession, and lived thereon taking care of the rest of the block. In November, 1864, he sold his 100 acres, and in December following, having to give up possession to the purchaser, moved on to the north half of this Lot 1, where he has resided ever since. In January, 1877, the father died, having by his will devised the north half of this north half to the defendant, another son, and the south half of the same north half to the plaintiff. The defendant, claiming this south of the north half under the devise to him, entered upon it, whereupon the plaintiff brought trespass, claiming that he had acquired the title thereto by possession. At the trial the learned judge found that plaintiff entered into possession and so continued merely as his father's caretaker or agent, and he entered a verdict for the defendant. He also remarked, without finding thereon, on evidence given of an entry on the land by defendant as his father's agent within the last seven years, whereby it was contended that a new starting point for the statute had been created.

On motion to enter the verdict for the plaintiff.

Per WILSON, C. J.—The evidence showed that plaintiff was in possession, claiming adversely to and not as his father's caretaker or agent, and that the subsequent entry was not proved.

Per GALT, J.—The evidence established the subsequent entry; and *semble* plaintiff's possession was merely as caretaker or agent.

The court being equally divided, the rule dropped, and the verdict stood, but the rule was directed to be discharged to enable the case to be appealed if allowed.

Ward Bowlby (Berlin) for the plaintiff.

McCarthy, Q. C., and *King* (Berlin) for the defendant.

VACATION COURT.

MARCH 14.

STONE v. KNAPP.

Husband and wife—Action for deceit—Plea of coverture—Sufficiency of.

A declaration charged that the defendant, the wife of Solomon Knapp, by falsely and fraudulently representing to the plaintiff that she was authorized by her husband to order certain goods for the wedding outfit of his daughter Charlotte, and to pledge his credit therefor, induced the plaintiff to furnish the goods and charge the same to the husband; that in fact she had no such authority, and the husband being sued therefor denied his liability; and after verdict and judgment of the County Court for the plaintiff, the judgment was finally entered for the husband by the court of appeal. The plaintiff claimed as damages the value of his goods and his costs.

Plea—That the defendant during all that time was and is wife of Solomon Knapp.

Held, on demurrer, plea good.

Bethune, Q. C., for the plaintiff.

H. J. Scott for the defendant.

CANADA REPORTS.

ONTARIO.

COURT OF APPEAL.

(*Reported for the* LAW JOURNAL *by* F. LEFROY, *Barrister.*

GOYEAU v. GREAT WESTERN R'Y. CO.

Practice — Appeal to Supreme Court—Time—38 Vict. ch. 11, secs. 25, 26, 28.

Where the 30 days allowed for appealing from the Court of Appeal by 38 Vict. ch. 11, sec. 25,

expired on a Sunday, without an order having been made allowing the appeal: *Held*, that this does not give the party wishing to appeal, the following day to procure his order, nor is it a "special circumstance" under sec. 26.

[January 29, 1879.—Burton, J.

Judgment in the above matter was given in the Court of Appeal, on Friday, December 6th, 1878, reversing the decree of the Court below, and dismissing the plaintiff's bill with costs. On Saturday, January 4th, 1879, the plaintiff filed security with the Registrar of the Court of Appeal, and on the same day served notice of filing it and of motion for allowance of the Appeal to the Supreme Court, returnable on Monday, January 6th. The motion was on that day enlarged at the request of the defendants.

W. Barwick, for the plaintiff, now moved for an order for allowance of plaintiff's appeal to the Supreme Court, the security required by 38 Vict. c. 11, sec. 31, having been filed.

H. Cassels, *contra:* The Court has no jurisdiction to entertain the application. By sec. 25 of the Supreme Court Act (38 Vict. c. 11), the appeal must be within 30 days from the pronouncing of the judgment appealed from, aud by sec. 28 the mode of bringing an appeal is laid down to be—"That the party desiring so to appeal shall, *within the time hereinbefore limited in the case*, have given the security required, and obtained the allowance of the appeal." Here the 30 days expired on Sunday (January 5th), without an order having been made allowing the appeal. No special circumstances are shewn to warrant an order allowing the appeal after 30 days, under sec. 26 of said Act.

W. Barwick, in reply: The last of the 30 days being a Sunday the plaintiff has the next day for complying with the Act, and motion to have the appeal allowed was on that day brought on and enlarged at the defendant's request, and therefore this motion must now be treated as if held on that day. This appeal should be allowed under sec. 26.

Burton, J., after conferring with the other Judges, held the last of the 30 days limited by sec. 25 of the Supreme Court Act for the allowance of the appeal being a Sunday did not give the plaintiff the following day to procure his appeal to be allowed, and is not a special circumstance warranting an order enlarging the time for such allowance under sec. 26 of the Act.

Motion dismissed with costs.

COURT OF CHANCERY.

(*Reported for* The Law Journal, *by* F. Lefroy, *Barrister-at-Law.*)

CHAMBERS.

Re Ford.

Surviving executor—Power to sell—Case stated under Vendor and Purchaser Act.

Where a testator devised lot A, "with power to the executors herein mentioned, to sell and invest the proceeds," the devisee to receive the interest during his life, and after his death proceeds to be divided among the testator's family, —and also devised lot B, subject to a condition that "if the executors think best, and if his mother agree to it, they may sell the said property," and after payment of debts, divide the balance among the testator's family; and in the clause appointing the executors, the words "to see my will carried into effect" were added: *Held*, as to lot A, the surviving executor could make a good title in it to the purchaser, but as to lot B, by the death of the mother the power to sell is gone.

[Proudfoot, V.C., Jan. 20, 1879.

This was a case stated under the Vendor and Purchaser Act, R.S.O., c. 109, sec. 3, by petition of Thomas S. Ford. The facts of the case fully appear in the judgment of the learned Vice-Chancellor.

C. Moss, for vendors, asked for construction of the will of William Ford, and cited *Lane* v. *Debenham*, 11 Hare, 188; Lewin on Trusts, 319; Chance on Powers; Farwell on Powers, 373; *Brassey* v. *Chambers*, 16 Beav. 231, 4 De G. M. & G. 528, and cases there cited.

Boyd, Q.C., *contra.*

Proudfoot, V.C. — William Ford died on the 2nd Dec., 1870, having first duly made his will, containing, amongst others, the following dispositions: "I hereby give and devise to my son William, during his life, the use of the east half of the west half of lot No. 28 in the 5th Con. of the Township of Moore, with power to the executors herein mentioned to sell the said parcel of

land and invest the proceeds, my son William to receive the interest during his life, and after his death said proceeds to be equally divided among my family or their heirs . . . . . I leave and bequeath to my son Thomas S. Ford the south-west part of lot No. 26, Front concession, in the said Township of Moore, containing 3 acres, with the buildings and appurtenances thereon, with all my personal property, in consideration of money advanced by him to me, said notes which he holds or may hold bearing interest at the rate of 10 per cent. per annum, with the following conditions, viz., he is to support his mother during her life, and if the executors think best, and if his mother agree to it, they may sell the said property, real and personal, and if the proceeds are more than satisfy just claims, the balance to be equally divided among my family or their heirs within one year after his mother's death, and I bequeath my son, the said Thomas S. Ford, in consequence of the responsibility devolved on him in supporting his mother, that in any division of property that may be, he is to have two shares, and be allowed what is reasonable for supporting his mother, the executors to take care of minor's shares until they are of age. And I hereby appoint and constitute my son, Thomas S. Ford, and my son-in-law, Richard Thomas, the sole executors to see this my will carried into effect."

Both executors proved the will in Jan., 1871. The widow died before the date of sale after-mentioned, and William Ford, the son named in the will, pre-deceased the testator.

In May, 1877, Thomas S. Ford sold the lands mentioned above to John Hyde and William Cathcart—an abstract of title has been furnished—the purchasers object to the title that, under the will of William Ford, Thomas S. Ford has no power to sell the first parcel—and that Thomas S. Ford has no power, either as executor or as devisee, to sell the second parcel.

The petitioner prays that these objections may be considered and adjudicated upon by the Court. It was conceded that these questions might properly be presented for the consideration of the Court under the statute

The first objection calls for a determination of the very much discussed question whether the survivor of two executors can exercise a power of sale given to the executors. The power is given "to the executors herein mentioned," and if a sale take place, the executors are to invest the proceeds. The direction that William is to receive the interest during his life, and after his death the proceeds to be equally divided among the family, appears to me to be a direction that the executors are to pay the interest to William during his life, and then to divide the proceeds. The investment is to be made by them, and it would presumably be made in their own names—there is no direction how it is to be made, but to enable the executors to preserve it for division, it would more properly be in their names than in others. And when so invested, the interest would require to be received by William through them, and the proceeds distributed to the family through them after his death. The clause added to the appointment of the executors, "to see this my will carried into effect," seems to point to the same conclusion. If this be the true construction of the will, then it is not a bare power in the executors, but a power coupled with an interest, vested in them in the character of executors, and, therefore, attached in this will to the office of executor. That it is given "to the executors herein named" is not equivalent to a power to them by name, involving the idea of a personal trust. In *Brassey* v. *Chambers*, 16 Beav. 231, 4 D. M. & G. 528, the power was given "to my executors hereinafter named," which Lord Romilly construed to mean that it was given to them *nominatim*, and not in their capacity of executors, but the Lords Justices dissented from this opinion. I cannot perceive an appreciable difference in effect between giving the power to "the executors herein named" and to "the executors hereinafter named." If in the one case it indicates that it is conferred upon them in their character of executors, it must have the same effect in the other.

The older books are full of cases on the subject, which have been collected and commented on by Lord St. Leonards in his work on Powers, 7th ed., 143 *et seq.* He says that at common law a naked authority given to several cannot survive. Therefore, if a man devise his lands to A for life, and that, after his decease, the estate shall be sold by the executors, naming them, as by B and C, his executors, or by B and C, who are not named executors—in that case, if one of them die during the life of A, the other cannot sell, because the words of the testator would not be satisfied. But where the words of the testator can be satisfied, a court of law will relax the rule. Therefore if three or more are appointed executors, and the devise is that the estate shall be sold by the executors generally, the survivors may sell, because the plural number of executors remains. In *Howell* v. *Barnes*, Cro. Car. 382, 1 Jones, 352, pl. 3, although it was holden that the executors took an authority only, yet it was determined that the survivor could sell,—it was not deemed necessary that the plural number should remain. Lord St. Leonards then states that Mr. Hargrave has endeavoured to establish that where the power is given to executors, or to persons *nominatim* in *that character*, the survivor may sell, as the power is given to them *ratione officii*; and as the office survives, by parity of reason the authority shall also survive, N. (2), Co. Litt. 113a, and adds, that the liberality of modern times will probably induce the courts to hold that in every case where the power is given to executors, as the office survives so may the power.

The conclusion he draws from the cases (p. 146) is—(3.) That where the authority is given to "executors," and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it; but

(4.) That where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive.

Mr. Williams, in his work on Executors (6th ed., 892 *et seq.*) quotes this as being the state of the law on the subject. Mr. Chance, Powers (s. 651 *et seq.*), criticises the cases cited by Lord St. Leonards and the conclusions deduced from them, and (sec. 669) seems to leave the question just as it had been left by him. Mr. Farwell, Powers (p. 372), states Lord St. Leonards' third conclusion, though not in the same words, practically to the same effect, adding *sed qu.*

Many other books might be referred to for a more or less extended mention of the subject, but adding nothing to the clearing up of the uncertainty.

In the American Courts, numerous cases have arisen involving this question. In *Putnam Free School* v. *Fisher*, 30 Maine, 526, 527, Shipley, C. J., said: "Where an estate is devised to executors *co nomine* in trust, the devise is made to the official not to the individual persons, and the whole trust vests in those who accept it and become executors of the will; and when an estate is so devised, or when the executors have by the will a power to sell, coupled with an interest in trust, a conveyance by survivors, or by those alone who accept the trust, will be good."

In this view of the law I concur; it appears to me to be consonant to reason, is supported by authority, by the opinions of some of our ablest writers, and is in accordance with the latest English decisions, *Brassey* v. *Chambers*, to which I have been referred.

I therefore hold that the surviving executor can make a good title in the first parcel of land to the purchaser.

As to the second parcel, it is very difficult to ascertain what the testator's real meaning was. He appears to devise the land and personal property to Thomas S. Ford, as a payment for money advanced by him, and in consideration of his supporting his mother during his life,—and, then, he gives his executors a power to sell the realty and personalty with consent of the wife, and if the proceeds are more than satisfy just claims, the balance to be equally divided among his family, and in that case Thomas was to have a double share. There was no previous devise of personalty, and no mention made of debts—probably he intended

this power to be exercised in case it should be necessary to sell to pay debts,—just claims. However that may be, it seems clear that Thomas takes a fee. That, by the death of the mother, the power of sale could not be exercised, as it required to be with her consent. The cases are collected by Mr. Chance (Powers, sec. 727, *et seq.*), and by Mr. Farwell (Powers, p. 117), and the rule seems to be that "If a power is given, to be executed with the consent of one or more persons, and that one, or any one of the others, dies, the power is gone." Franklyn's case, Moore, 61, pl. 172. The power of sale given by the will here became extinct on the death of the mother without having given her consent. Any sale now will be made in exercise of the right of ownership that Thomas possesses. The conditions mentioned in the will upon which Thomas took the estate, were to support the mother, and to sell with her consent. He has supported his mother, and the other condition has ceased; there remains, therefore, the right of ownership.

I think that Thomas S. Ford as devisee of this second parcel can make a good title to the purchaser.

Crossman v. Shears et al.

Appeal—Payment of money paid in in lieu of bond—R.S.O. c. 38, sec. 27, subs. 4—ib. sec. 31.

Where a party appealed and paid into Court the amount of costs taxed to a defendant in the Court below, in lieu of giving a bond, and the appeal was allowed with costs, costs of the Court below being reserved, *Held*, party appealing was entitled to order for payment out of money so paid in, notwithstanding Defendant had given notice of appeal to Supreme Court.

[Mr. Stephens—Jan 29, 1879.

In this case a decree was made dismissing the bill as against one Irish, a defendant, with costs. The plaintiff appealed and paid into Court the amount of costs taxed to the said defendant in lieu of giving the bond as required by R. S. O. c. 38, sec. 27, subs. 4. The appeal having been allowed with costs (costs of the Court below being reserved until after the taking of the accounts in the Master's Office),

H. D. Gamble, now moved for payment out to the plaintiff of the amount paid into Court as aforesaid. He read the certificate of the Court of Appeal allowing the appeal, and the order making the same an order of this Court.

G. Morphy, contra. The defendants have given notice of their intention to appeal to the Supreme Court. By R. S. O. c. 38, sec. 31, an appeal is only a step in the cause, therefore the plaintiff is not entitled to have this money paid out until the appeal to the Supreme Court is dismissed. Besides by the judgment of the Court of Appeal, the question of the costs of the Court below is reserved.

Gamble, in reply: The money was paid into Court in lieu of giving the bond required by the Appeal Act. Now, if that bond *had* been given, the plaintiff having succeeded in the appeal, the condition of the bond would have been now fulfilled, and even if the defendants should succeed in this appeal to the Supreme Court, they could not have recovered on the bond. The defendant Irish, is not now entitled to be paid his costs, the question of the costs having been reserved until after the taking of the accounts in the Master's Office. Consequently, the plaintiff has as much right to ask security as against Irish, as Irish has to ask it as against him. He cited *Lindsay Pet. Co.* v. *Hurd*, 3 Chy. Ch. 16, and the judgment of Spragge, C. in *Billington* v. *Prov. Ins. Co.* not yet reported, and referred to R.S.O. c. 38, sec. 27, subs.4.

The Referee granted the order with costs.

St. Michael's College v. Merrick.

Appeal from certificate of taxation—Proper time for appealing.

Where costs have been taxed and the amount entered in an order, an appeal from the taxation must be disposed of before the issue of the order, otherwise it is too late.

[Blake, V. C.—Feb. 24, 1879.

The plaintiffs appealed from the certificate of taxation of the costs of one of the defendants. The judge's order directing payment by the plaintiffs of the said costs as taxed had been issued.

Bain, for the defendant. The appeal should have been brought before the final issue of the order, which would on proper

application have been delayed for that purpose. The present application must of necessity be in the nature of a rehearing of the original order, otherwise two inconsistent orders would stand.

Donovan, contra.

Blake, V. C., sustained the objection and dismissed the appeal holding as above.

Appeal dismissed.

MASTER'S OFFICE.

McDearmid v. McDearmid.

Conveyancing — Release of dower to tenants in Common—Accrual.

Where a widow purported to release "All my dower . . . in, to, out of all that certain . . . lot" to two of more tenants in common, *Held*: (1) her dower was gone in the whole lot; (2) there was no accrual in favour of the other tenants in common.

[Mr. Taylor.—Dec. 9, 1878.

This was a partition suit. The widow claimed dower, and the question arose in the Master's Office as to what was the legal effect of a certain quit claim deed, dated January 8, 1869, by which J. McD., the widow, released as follows: "I . . . . quit claim unto the said Donald McD. and Malcolm McD. their heirs executors and administrators all my dower or right or title to dower and arrearages of dower which I now have or can or may hereafter have or claim in to out of all that certain parcel or tract of land and premises . . . containing . . . 200 acres . . . and being composed of lot 31." Besides Donald and Malcolm there were four other persons entitled to shares in the land, subject to J. McD.'s right of dower, as tenants in common. Malcolm's interest had become vested in one Currie, and there had been divers cross conveyances between the parties.

Foster, for plaintiff: The widow cannot claim against the persons to whom she released. They were tenants in common, and have undivided shares; therefore her dower is gone in the whole. Or, if her claim is merely right of action, it is gone, and the result is the same. Donald has parted with his interest, and his grantee has a right to share in the dower.

Seton Gordon, for Currie: Dower can be assigned in equity, though not in law. The release does not speak of releasing the shares of the grantees, but all dower. A release to some tenants in common accrues to the benefit of all.

Hoyles, for Malcolm: The parties here are not joint-tenants, but only tenants in common, therefore there is no such accrual. Donald and Malcolm can claim to have the dower assigned to them. A stranger could have done so, therefore so can they. They are strangers to the estates of the other tenants in common. The quit claim deed is sufficient to pass a fee. He cited various authorities.

Foster, in reply: If Malcolm as assignee make a claim, and some of the parties were ready to assign to the widow her portion, out of what part of the land would she take it, the shares being undivided?

The Master: In my opinion, the effect of the release and quit claim deed of Jan. 8th, 1869, executed by J. McD., was to give her two sons, Donald and Malcolm, all her right to dower in the 200 acre lot. Then Donald conveyed to Malcolm all his interest in the east half, and Malcolm conveyed to Donald all his interest in the west half, so that Malcolm then owned his mother's life estate as doweress on the east half, and he was also entitled, subject to that life estate, to 2-11ths, and Donald had the same interest in the west half. By several mesne conveyances the interest Malcolm had in the east half is now vested in Currie, who is entitled thereto, including the widow's dower in that half, and to the shares which he has acquired from some of the other members of the family. The interest Donald had in the west half is now vested in Malcolm, who is similarly entitled.

Darling v. Darling: Re Rossas' claim.

Practice—Administration suit—Impeaching an instrument in the M.O. for fraud—Practice in such cases—G. O. 60.

Held, (1) An instrument may be impeached in the Master's Office for fraud, where the question legitimately emerges during a reference. (2) This may be done, though an executor be thereby delayed in passing his accounts, where the question raised affects the accounts, and where, moreover, the executor is charged with participation

in the fraud. (3) This may be done where the question of fraud is raised by persons served with copy of decree under G. O. 60.

[Mr. Taylor—Nov. 19, 1878.

This was an administration suit, and the following matter came up upon the proceedings in the Master's Office on the accounts of the executor, W. Darling. The point concerned the payment of a certain legacy and annuity under the will to Madame Rossa, a lady resident in Naples, to which legacy and annuity she had filed a claim. The executor contended that by a written instrument signed in 1859 Madame R. had renounced all benefits under the will on condition of receiving thirty ducats a month for life, and he said that the remainder of the said annuity had been paid to or expended for the benefit of one Herbert Darling, who by the will was to receive the corpus of the annuity after death of Madame R.

Bethune, Q.C., asked that Madame R. be made a party and proposed to impeach the settlement of 1859 on grounds of fraud and mistake.

Bain, contra, contended that an instrument cannot be impeached on grounds of fraud in the Master's Office.

The MASTER ruled that the question can be raised in the Master's Office. *McDonald* v. *Wright*, 12 Gr. 552, is directly in point. For this purpose a statement should be filed setting out the grounds upon which the settlement is impeached. It can then be decided whether the proceeding should be disposed of here or a bill directed to be filed.

A statement having been filed, the latter question came up for decision.

Bain (1) Onus rests on claimant to show that the executor can be called upon to answer her claim. (2) The executor is not directly interested. The chief question here is one of accounting, and he should not be harassed by proceedings to set this settlement aside. (3) Herbert and Madame R., though they have appeared and have consented to be bound by the Decree as though served under G. O. 60, are not parties for all purposes. (4) This is going further than *McDonald* v. *Wright*. (5) There has been more than twenty years' delay. (6) Fraud should be raised before the Court, not in Master's Office. (7) A commission to Italy should be necessary.

Moss, contra. (1) The executor represents all parties. (2) He is directly interested, and it was he who instigated the settlement. (3) Whenever any objection arises incidentally the Master has to dispose of it: *Buckland* v. *Rose*, 7 Gr. 440, *Dewar* v. *Sparling*, 18 Gr. 633, *Kersten* v. *Tane*, 22 Gr. 547. There is no reason against the Master proceeding. (4) Here the claimant, Madame R., has been brought in, and the Master must ascertain the rights of the parties and of the claimant if she has any. (5) If the arrangement is for the benefit of the estate, the executor is bound to contest the claim now made, and the Master cannot cast the matter on the Court.

Bain, in reply. The executor does not represent Herbert, who alone gets the benefit of what Madame R. gave up; and so he has no interest, and this suit should not be left hanging over him. If the Master finds Madame R. entitled to anything it can only be thirty ducats a month until the release is set aside.

THE MASTER held that, although it was necessary to consider and decide upon the agreement of 1859, this was no reason for refusing to entertain the claim of Madame R. He said:—"There may be cases when on a question raised in the Master's Office it would be proper for the Master to say a Bill must be filed and the question disposed of by the Court, but such cases must be very rare indeed. No question is raised here more important or more difficult than the questions raised there every day. The tendency of the practice and the object of numerous general orders passed during late years have been to extend the powers of the Masters and to enable and indeed require them to dispose of all matters which legitimately emerge during the progress of a reference pending before them. The question raised here has done so. Under the decree I am to take an account of the dealings of the Defendant William Darling with the estate of the testator. I have to

ascertain what payments he has made and whether these have been made to the proper persons. I have also to enquire who are the persons entitled to share in the real and personal estate of the testator, and in what proportions respectively. How can I make these enquiries and report on them to the Court without entertaining and disposing of the questions raised here?

It is said, however, that William Darling is here accounting for his dealings with the estate, and that he should not be delayed or hampered in doing so by this contention which is really one between two of the parties interested, and not between the executor and any other parties.

There may be cases in which an executor may be entitled to say that the passing of his accounts should not wait until all the questions arising in the suit are disposed of, and may claim to have a special report made as to the matters in which he is interested.

Here, however, he seems to have an interest in the question raised, upon the disposition of which his accounts may depend. The claimant by the agreement, the validity of which is now questioned, gave up out of the £100 to which she was duly entitled the sum of £25 in favour of Herbert Darling, and of the remaining £75 she gave up all but twenty ducats, or, in the event of her marrying, thirty ducats a-month to the executor, to make such use of it as he should in his conscience think most in accordance with the intention of the testator.

Besides, she alleges that it was the executor who formed the design of depriving her of the benefits conferred upon her by the will, and that he procured his father William Darling the elder to induce her to forego this; and that William Darling the eldor was, in fact, only the agent of the executor, and as such, made the representations and statements by which she was deceived and induced to make the agreement which she did.

The claimant may or she may not be able to prove these allegations. She may be unable to shew that any imposition was practised upon her, or any undue influence used; but, in the meantime, the claim as presented is such as to call for an answer from the executor.

The objection that neither the claimant nor Herbert Darling are parties to the suit is not a reason for refusing to entertain the claim, or requiring a bill to be filed. They are both persons who should be served under G. O. 60, and both have, without being served, appeared by their solicitors, waived service of process, and consented to be bound by the decree as if served.

That the persons to whom G. O. 60 applies are not now, as formerly, made parties in the first instance, is, as I understand it, simply to lessen the costs. Such persons, when they have been served, may, under the terms of the order, upon notice to the plaintiff, attend the proceedings under the decree, although they may not in every case get allowed the costs of doing so.

Now, for what purpose are they allowed to attend the proceedings under the decree if not to watch them, and take part in them, and to raise any questions necessary for protecting their interests, or securing their rights? Here the claimant is before the Court, the question raised is one which materially affects her interest, and I am bound to entertain and dispose of it.

The defendants, William Darling and Herbert Darling, should therefore file such statement or answer to the claim as they may be advised within a limited time. For this purpose, I think, twenty-one days should be sufficient.

IN THE COUNTY COURT OF THE COUNTY OF SIMCOE.

O'NEILL v. SMALL and SHERIFF.

Chattel Mortgage.

Where the payments to be made on a chattel mortgage extend over a year from its date, it is void as contrary to the policy of the Act respecting Chattel Mortgages.

[Jan. 21, 1879.—GOWAN, Co. J.

This was an interpleader issue. The goods were seized under an execution, in favour of the defendants, against one Elizabeth Sullivan, a daughter of the plaintiff. The plaintiff's claim was founded on a chattel mortgage from Elizabeth Sullivan, dated 3rd January, 1878, and duly registered, containing the proviso, that if the mortgagor

paid $440.00, with interest at 6 per cent. from the 13th August, 1877, in quarterly payments in two years, from the 13th August, 1877, the instrument should be void.

The case was tried before His Honour Judge Gowan, without a jury, at the December sittings of the County Court, at Barrie.

O'Sullivan, for the defendant, contended that the mortgage was void, because: (1) It was to run over two years and a half, in respect of payment, which was contrary to the policy of the Act; inasmuch, as, by the Act, a mortgage is valid for only a year: *Beaty* v. *Fowler*, 10 U. C. R., 382. (2) This mortgage anticipated renewal, and yet renewal cannot be anticipated by a day. (3) Under sec. 6 of the Act, mortgages are expressly limited to a year, and *a fortiori* in this case, where there was present indebtedness, and no renewal was contemplated. (4) In sec. 2 there is language to show that the Legislature contemplated the money being "due or accruing due" at the time the affidavit of the mortgage was made. This is before any reference was made to a renewal, and could only refer to the mortgage money, "the sum mentioned in the mortgage."

Strathy, for the plaintiff. (1) A chattel mortgage for over a year is perfectly valid at Common Law, and this mortgage as *between the parties* could not be impeached. If such an instrument is rendered invalid by the Act, it can only be by express enactment or clear implication. (2) This chattel mortgage, if within the Act at all, is a mortgage within sec. 1. Everything required by that and the following sections was done, so that sec. 4 does not make the mortgage invalid. The only other section affecting the validity of such mortgage is sec. 10, but as the instrument has not run a year, that section could not make it void. (3) If it is urged that the chattel mortgage Act contemplates that no chattel mortgage shall extend over a year—and sec. 6 (which, however, does not affect such a mortgage as this) does certainly make a provision to that effect, and (see *Kough* v. *Price*, 27 C.P. 309), then this instrument is quite outside of the Act; and if so, the Common Law rules as to its construction must obtain: *Patterson* v. *Maughan*, 39 U.C.R. 371, at p. 379.

The learned Judge thought the mortgage void, on the grounds submitted, and entered a verdict in favour of the defendant.

In the following term,

Strathy, for plaintiff, moved for a *rule nisi* to set aside the verdict for defendants, and enter a verdict for the plaintiff.

Gowan, Co. J., in giving judgment, said in substance:—As the point was a new and important one, and as the intention is, I understand, to take the case to the Court of Appeal, it will save needless cost if I refuse a *rule nisi*, which I do, for I still think the objections taken at the trial good, and that the mortgage is void; what struck me more particularly in the points put forward on behalf of the defendant, contending that the payment running for a period of two years the mortgage was void under the statute; was that, as the security afforded by the mortgage under the Act "ceases to be valid" at the end of a year from its date, it could not at its inception be made security for more than a year, though a renewal of the security (from year to year it may be) is contemplated by the Act. A renewal may be effected as provided, but anticipation of that renewal is contrary to the policy of the law—it could never have been intended by the Act that a debtor should be able to lock up his chattel property from year to year or for an indefinite time. Sec. 6 relating to future advances and promissory notes restricts to a year for payment, and I quite think that the restriction in sec. 6 was to bring the security in conformity with the general terms of the Act and make it an annual security.

Rule refused.

NOVA SCOTIA REPORTS.

SUPERIOR COURT.

(*Before* DesBarres, McDonald, Smith, *and* Weatherbe, J. J.)

In Re Leake v. Laidlaw, Insolvents.

Insolvent Act—Statute of Limitations.

A claim less than six years old at the date of a writ of attachment is not barred by the Statute of Limitations because the six years expire before the declaration of a dividend.

[Halifax, Jan. 9, 1879.

In this cause, the claimant Yorke filed a claim against John Leake, one of the partners of the firm of Leake & Laidlaw, against whom a writ of attachment had been issued under the Insolvent Act of 1875. The claim was collocated on the dividend sheet of the partnership estate, and Chesley on behalf of the claimant or his assignee applied to have a separate dividend sheet of the private estate of John Leake prepared, and that this claim should be placed upon such separate dividend sheet. After this the Inspectors objected to the claim *in toto* on the ground, among others, that the debt was barred by the Statute of Limitations.

The Judge below (Judge Morse, of the County Court, District No. 5) held, although the debt was not barred by the Statute at the time of the assignment, that it became so before the declaration of the dividend, and as there were no other private claimants, he refused to order the preparation of a separate dividend sheet. From this decision, and the two orders founded upon it, an appeal was taken.

S. A. Chesley, for claimant, contended that the assignee took possession of the estate in trust for the creditors, and that the Statute of Limitations did not run against a trust; that the claim, not being barred by the Statute at the time of the assignment, must be allowed to rank on the estate, citing sec. 80 of the Insolvent Act of of 1875, and 2 Glyma and Jameson, 46, and 330.

Motton, Q.C., contra, contended that the Statute having commenced to run against the claim, was not barred by the assignment, and could not be suspended by any causes other than those set out in the Statute of Limitations itself, or express enactment in the Insolvent Act.

C. A. V.

DesBarres, J., delivered the judgment of the Court.

In the matter before us yesterday, we have all turned our attention to the question raised, and, as the counsel must have observed yesterday, there was a pretty strong opinion among us that the Judge had taken an erroneous view of the matter. It is hardly to be wondered at that he should have done so, not having had any authorities to assist him in forming his judgment. The strong impression we had yesterday has been confirmed by looking at the cases since. We think it would be monstrous if, in a case like this, a plea of the Statute of Limitations could be set up, and we are disposed to act upon our impression, and decide accordingly.

CORRESPONDENCE.

Appointment of Q. C.'s and J. P.'s.

To the Editor of Canada Law Journal.

Sir,—No lawyer acquainted with the subject of the Royal prerogative as connected with the working of our present constitution, can be surprised at the recent utterances of the Supreme Court of Canada on the attempted appointment of Queen's Counsel by the Local Governments. It is a mystery to most of the *profanum vulgus* who accept, it is to be hoped, with profound reverence the ordinary deliverances of those High Priests of Law who speak ex cathedra in our Provincial Temple, how they ever were brought to pronounce that the power rested in both Dominion and local Governments, and that an Act of the local Legislature could avail to transfer a prerogative like the appointment of Queen's Counsel from its royal source to an artificial reservoir. If the authority to make such appointments rests anywhere in Canada, it can be nowhere else than with Her Majesty's directly commissioned representative, the Governor-General. If any legislative authority in this Dominion can deal with

matters appertaining to the exercise of the prerogative, it can only be the Parliament of which that exalted personage is a constituent part. It does not follow that the Lieutenant-Governor is not in some very important matters, and in a very dignified sense, the Representative of the Crown within the Province; and that he may not have his prerogatives, *quasi* royal ones, some of them, in his subordinate sphere of authority. In minor matters, and more limited spheres, Clerks of Courts, Sheriffs, and other public officers, in a sense, represent the Crown. Even the petty peace officer, when he executes his warrant, arrests his prisoner "in the Queen's name."

But it seems most strangely to have escaped general attention the last eleven years that the same principle which governs the appointment of Queen's Counsel applies equally to Justices of the Peace, whose appointment is the peculiar prerogative of the Crown. Indeed, the application is more plain and obvious in their case, because it was by virtue of the Royal Commission that our Governors, before Confederation, appointed those officers. I do not yet know the terms of the present Governor-General's Commission, but I know that the Commission of a former Governor-General expressly authorized him to appoint Justices of the Peace and Coroners throughout the Dominion. I think it was Mr. (now Judge) Savery, when a member of Parliament from Nova Scotia, who called the attention of the Government to this part of the royal instructions, and inquired if it was the intention of Ministers to advise His Excellency to act upon it. From the report of a discussion that took place, it seems to have been conceded by many lawyers who ought to have known better, that if the local Governments had not the power, the local Legislatures could give it to them; as if those Legislatures could legislate away from Her Majesty's Representative any portion of the authority with which she had been graciously pleased to clothe him. One Maritime Province acted on the suggestion: (*See* Rev. Stat. N. B., ch. 29 p. 208) the Government of another, without even that pretext, coolly usurped the authority, and a sorry mess has been made of it! Why the average character of the appointments since 1867 has reduced a once venerated office to profound degradation; it was bad enough before, but every year since we have been taught that "beneath the lowest deep a lower deep still yawns." It is some solace to reflect that not one of these commissions is worth more than the ink it was written with. If it be not deemed desirable for the Dominion Government to make these appointments, Parliament (not the local Legislature) might *possibly* pass a valid enactment enabling the Governor-General to confer authority on the local Governors to make them subject to his ratification in each case, or to nominate them for appointment by him. Or I might venture to suggest that the Governor-General might have a "power of substitution" in these matters enabling him to delegate the authority to the local Governors. This, of course, depends upon Her Majesty's royal will and pleasure which might be invoked by an humble address of Parliament, praying her so to act. And if there be a doubt as to the authority of the Governor-General to appoint Queen's Counsel, Her Majesty might, in the same way, be induced graciously to confer upon him that authority, and included in the commission and instructions to his successors, but without such power of delegation. Then a judicious and careful selection might be made from our Bar, including, especially, those whom our local Government sought to honour, while they degraded the office. But among these, the stripling who has not won his spurs would step back into the ranks and bide his time; the man whose unprofessional practices render his society loathsome to his fellow-barristers would no longer take precedence of the upright and worthy; and the dissolute and abandoned would no longer carry his Q.C. into the haunts of prostitution, and trail the silk robe in the mire of profligacy and vice.

Yours, &c.,

Lex.

Nova Scotia, Feby., 1879.

[Whilst we do not pretend to have any knowledge of the character or fitness of the

gentlemen appointed by the local governments and above referred to, we do not feel justified in refusing to publish the letter of our esteemed correspondent. The subject is in itself a very important one; but we do not at present propose to discuss it, inasmuch as the question of jurisdiction spoken of is still before the Supreme Court. We shall, however, return to the subject again. Eds. L. J.]

Married Woman's Act.

To the Editor of The Law Journal:

Sir,—Notwithstanding an expression of his Lordship, Mr. Justice Patterson, in his well-considered judgment in *Standard Bank* v. *Boulton*, 3 App. R. 101, intimating that real estate acquired after the date of the passing of the Married Woman's Act of 1872, by a woman married before that Act took effect is such separate estate as can be bound by her contracts. The writer ventures to submit that such a construction of the Married Woman's Act now in force (cap. 125, R. S. O.) would not be correct. There can be no doubt but that such was the effect of the Act in question before the Revised Statutes of Ontario took effect (January 1, 1878), as is clearly laid down in *Adams* v. *Loomis*, 22 Grant, 99, and 24 Grant, 248; but the writer submits that this can be no longer law.

A perusal of sec. 1, cap. 16, 35 Vict. (Ont.) and of sec. 4, cap. 125 R. S. O., will at once indicate the great change in the Act as consolidated, which change was in effect made by cap. 7, 40 Vict. Schedule A (156). The Act as consolidated, and now in force, enacts that the *date of marriage* determines the powers a married woman shall have over *her real estate*. A woman married between the 5th day of May, 1859, and the 2nd day of March, 1872, has, during such marriage, over her real estate, no matter when acquired, merely the *jus prolegendi*, and cannot bind such real estate by her contracts—See section 3 of the Act as revised. A married woman after that date has, during marriage, all the powers of a *feme sole* over her real estate, and can bind it by her contracts made with reference to it—See section 4 of the revised Act. Probably no Statute passed in this Province has given rise to so much litigation as the Acts relating to married women, owing, probably, to the fact that the Legislature desired to protect her estate and extend her powers over it, but did not correctly appreciate how this should be accomplished.

The writer thinks that the Statute—as now revised—interfering with no vested rights, is less open to objection than the Act of 1872. At present, a husband married before the 2nd March, 1872, is not deprived of his tenancy by curtesy, no matter when his wife acquires her real estate; but such was not the law—see *Adams* v. *Loomis*—prior to the revised Act. It certainly was hardly fair that a husband who married before 1872 should be deprived of his estate in his wife's lands which previously he had, no matter when such lands were acquired, on birth of issue of the marriage. This anomaly no longer exists.

Solicitor.

Chancery Briefs.

To the Editor of Canada Law Journal:

Sir,—In the March number of the Law Journal, you refer once more to the annoyance and inconvenience suffered by the Judges from the omission of dates of pleadings in Chancery Briefs. I venture to suggest a simple, and I believe efficacious, remedy.

Let the Chancery practice follow that of the Common Law, and direct that every pleading shall bear date on the day it is filed—(see Rev. Stat. Ont., cap. 50, s. 88). The date should be inserted on the line immediately above the first paragraph of the Bill or Answer; then the copying clerk will find the date on the face of the document he is copying into the Brief, and he will no more omit the date in a Chancery Brief than he would in a Common Law Brief or Record. The difficulty now is, that the copying clerk, in order to get at the date of the filing, has to refer either to some other document, or perhaps to some memo. at the foot of or endorsed on the pleading, and that is an amount of care and attention which it is hopeless to expect.

Yours truly,

A. B. C.

Hamilton, 7th March, 1879.

Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 42ND VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

William Egerton Perdue.
Elgin Schoff.
James Haverson.
John Cowan.
Ernest Henry Eden Eddis.
Edward Sydney Smith.
John Gilbert Gordon.
Joseph Alfred Wright.
Chester Glass.
Peter Vances Georgen.
James Pearson.
John Bishop.
Frederick William Barrett.
Thomas William Howard.
Daniel Bayarde Dingman.
John Inkerman MacCraken.
James Dowdall.
John Hodgins.
Reginald Gourlay.

And as special cases under 39 Vic. cap. 31 :—

John MacGregor.
William Jex.
Charles McMichael.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

Villeroi Switzer.
Henry Lincoln Rice.

Matriculants.

John Percy Lawless.
Thomas Hadzor Marshall.
Richard Henry Hubbs.
John Robertson Miller.
N. H. Beemer.

Juniors.

Stephen Frederick Washington.
William John Northwood.
John Graham Forgie.
Samuel Thomas Scilly.
Daniel Urquhart.
Levi Thompson.
Denis Joseph Mungovan.
Thomas B. Shoebotham.
Thomas Young Cain.
William Dickinson Farrell McIntosh.
John Dick Hepburn.
David Kirkpatrick J. McKinnon.
David Thorburn Symons.
James Bicknell.
Arthur Wellington Burk.
Lesslie Livingston Jackson.
Charles Creighton Ross.
Arthur Eugene Fitch.
Matthew Elliott Mitchell.
Robert Notman Ball.
George F. Cairns.
James Sidney Garvin.
Gerald Bolster.
Robert Christie.
Noble A. Bartlett.
Arthur Fred. James Spencer.
William Gilbert Macdonald.
Arthur William Johnson.

Articled Clerks.

William Henry Gordon.
Herbert Henry Bolton.
George Holmes Anderson.
Harold Victor Bray.
Edwin Duncan Cameron.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1–300; or,
Virgil, Æneid, B. II., vv. 1–317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1–300.

1880 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1–300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1–300.
Virgil, Æneid, B. I., vv. 1–304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. / Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year. —Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year. —Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junio Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR MAY.

1. Thur..Paris Exposition opened, 1878.
4. Sun...3rd Sunday after Easter.
6. Tues..Primary examinations.
7. Wed..Primary examinations.
8. Thur..Primary examinations.
5. Sat....Treaty of Peace between France and Germany, 1871.
11. Sun...4th Sunday after Easter.
13. Tues..Court of Appeal sits. Co. Court sitt. for York begin. 1st Intermediate exam.
14. Wed...2nd Intermediate examination.
15. Thur..Examination for Attorneys.
16. Fri....Examination for Call.
18. Sun...Rogation. D. A. Macdonald, Lieut.-Gov. of Ontario, 1875.
19. Mon...Easter Term begins. Convocation meets.
20. Tues..Convocation meets.
22. Thur..Ascension day. Earl Dufferin, Gov.-General, 1872.
24. Sat....Queen's Birthday, 1819. Convocation meets. Treasurer and Committee elected.
25. Sun..1st Sunday after Ascension.
30. Fri....Mr. Proudfoot appointed Vice-Chancellor, 1874.

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Canada Law Journal.

Toronto, May, 1879.

As we go to press, the news comes that a vote has been passed in the House of Commons to repeal the Insolvent Act. It is not likely that the Senate will follow suit, and it is possible, if time permits, that some one of the many suggested alterations may be carried out; if not, things will remain as they were for another year.

A correspondent sends us another "Final Notice before proceeding in the Division Court." It is not necessary for us again to refer to the matter. We have done our share in directing attention to the evil. We are glad to notice that in one County, at least, a prosecution has been commenced against the offender.

A strong feeling has been shewn in the country against the Supreme Court, as evinced by the vote on Mr. Keeler's motion in the House of Commons to do away with it. Some persons speak of this as unaccountable. It may be unreasonable, or at least unwise, but we think it can easily be accounted for, and for some or all of the following reasons: The Court is very expensive, and of a value not always, or easily appreciated; in other words, it is thought that "the game is not worth the candle."—The profession, as a whole, have not that confidence in it which should appertain to a court of final resort; for example, there is hardly a lawyer, in this Province at least, who would not, on a question of Ontario law, prefer the opinion of our Court of Appeal, or even of one of our Superior Courts—Great and unnecessary delays in giving judgment, causing much annoyance and dissatisfaction to suitors.

On several occasions there has been on the part of the Court a marked disregard for the convenience of the profession in the hearing of causes—and, as a minor matter, there has been a tardy issue of the reports of cases decided, and this reporting being generally done (though improved of late) in an incomplete and defective manner. That there must be some such forum as the Supreme Court, for the decision of a certain class of questions, is manifest; it is also manifest that the Court, so far, has been a disappointment.

PREFERENCE OF A SURETY IN INSOLVENCY.

There appears to be a good deal of confusion in the authorities as to the position and liabilities of a surety, who requests and procures payment to be made by the principal debtor, shortly before his going into insolvency. In the case of an accommodation party to a promissory note, it seems to be laid down that if he has cause to believe that the chief debtor is unable to meet his engagements, and solicits the payment of the note by him to a holder who has not such knowledge, this, whether the note is current or has matured, amounts to a fraudulent preference of the surety: *Churcher* v. *Cousins*, 28 U. C. R. 540, and *Botham* v. *Armstrong*, 24 Gr. 216. Indeed the position is laid down in the head note of the latter case very broadly, but very unwarrantably (so far as the text of the judgment goes), that where the payment of a note has been procured by the indorser, he is, under section 133 of the Insolvent Act of 1875, liable to make good the amount thereof to the assignee. But it is to be observed that where the subject matter involved is *money* paid (as opposed to *goods*, *effects*, &c., which is the language of section 133), then the section properly applicable to such a case is the 134th: *Smith* v. *Hutchinson*, 2 App. R. 405; and section 134 does not appear to contemplate the case of a surety as above stated, for that section applies only to the recovery of money from the person to whom it has been paid. The United States statute goes beyond ours, and expressly provides for the case of a person for whose benefit a payment is made, so that a surety is within the purview of this Act: *Bartholow* v. *Bean*, 10 Bank. Reg. 241; S. C. 18 Wallace, 635. The present Insolvent Act does not even go so far as the old Insolvent Debtors' Act, to be found in Consolidated Statutes of Upper Canada, cap. 18, sec. 57. This was pointed out by Van Koughnet, C. in *Roe* v. *Smith*, 15 Gr. 346, where he said: In the old Insolvency Act, the debtor, on the eve of insolvency, is prohibited from making a voluntary payment or assignment of property to a creditor or to a surety for him; but in the Insolvent Act of 1864, it is the creditors only and not the surety who is inhibited from receiving payment or security for a debt. He goes on to observe, "*the surety is not a creditor till he pays the money.*"

We think that this is the only correct reading of the Act, and that the surety who does no more than procure payment to be made to the creditor, is not exposed to successful attack under either of the sections, 133 or 134. There are English authorities bearing on this question, which do not appear to have been cited in any of the cases before the Canadian Courts, which fortify the conclusion above indicated. The mischief of fraudulent preference, under the terms of the Act, arises where payment is made or security given to the creditor or surety intended to be benefited or preferred, but not where payment is made or security given to one with intent to benefit another. It is true that in *Marshall* v. *Lamb*, 5 Q.B. 115, it was held that a case of fraudulent preference arose where pay-

ment was made to the creditor with intent to retain the property of the debtor's wife, and on that ground the creditor (strange to say) was ordered to refund the money, but this case has not been followed, and is opposed to many more meritorious decisions. (Refer to the comments on this case in Archbold's Bankruptcy, vol. i., p. 430.) *Belcher* v. *Jones*, 2 M. & W. 258, is a strong authority for the position that the intent must be to prefer the creditor who is paid. So it is said, if A. and B. are both creditors for same debt, payment to A. with the intention of securing B. is not a fraudulent preference of A: see Byles on Bills, p. 464, note f (12th ed.).

From a comparison of other English cases, the law laid down there seems to be this: If a party to a bill or note for the accommodation of the maker has money sent to him by the principal debtor, with which he pays the notes, that is a fraudulent preference of the surety and the assignee can recover from him. But if the surety is not a party to the security, but is only collaterally liable, as having given a separate guarantee for the bill or note, then his getting the money from the principal debtor and paying it would only constitute him an *agent* for that purpose of the person liable on the bill or note, and the transaction would not amount to a fraudulent preference of the person so collaterally liable: see *Abbott* v. *Pomfret* 1 Bing. N. C. 462, and *Guthrie* v. *Devereux*, 2 C. & P. 301. It is to be remarked, however, that this distinction is not recognised in *Abbott* v. *Pomfret*, as reported in 1 Hodges, 25. There the judges are reported as holding the view (which is the more reasonable one) that whether immediately liable as being a party to the bill, or collaterally liable as having guaranteed the payment of it, the receipt of the money by the surety from the principal to discharge the note would be a fraudulent preference of the surety.

Another point of interest in this connection may be mentioned. If payment is made by the principal debtor to the creditor, and this payment is afterwards avoided as a preference under the Bankruptcy Act, the surety is not discharged by reason of such payment. His liability revives on the avoidance of the preferential payment: *Pritchard* v. *Hitchcock*, 6 M. & Gr. 157, followed in *Petty* v. *Cooke*, L. R. 6 Q. B. 790.

THE CHARITABLE SPIRIT OF THE LAW.

(*Concluded.*)

At the conclusion of the last article on the above subject allusion was made to certain apparent departures from a spirit of charity. It seems well to notice them here since many of them appear in connection with the presumption against crime, illegality, and dishonesty, to which attention has hitherto been confined. They are founded, for the most part, on considerations of public policy. Thus, both in criminal and civil cases, a person is liable for what is done under his presumed authority: Tayl. on Ev.; Ed. 7, 129-130, although, indeed, the act of an agent can never convict his principal of a *crime* without further proof (*ib.* 762). Another exception might appear to exist in the rule laid down in *Rex* v. *Woodfall*, 5 Burr. 2667 (1770): "Where an act is in itself unlawful the proof of justification or excuse lies on the defendant, and on failure thereof *the law implies a criminal intent.*" Yet the safety of society, joined to the difficulty of proving psychological facts, renders this presumption necessary: Best. Ev. 548. Again, Judges will occasionally permit or even advise juries to infer negligence from the mere happening of an accident, *e. g.*, *Byrne* v. *Boadle*,

2 H. & C. 722 (1863). Of such cases it may be said *res ipsa loquitur* (*ib.* per Pollock, C. B.). There are, too, certain apparently harsh presumptions attaching to particular trades, as, *e.g.*, common carriers, cabmen, and innkeepers (see, however, R. S. O. c. 147); but such instances are explained as necessary to the public welfare.

And, probably, a like necessity must be evoked to justify the many undeniably hard cases which have arisen out of the rule that, where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, although it may be absurd or mischievous: Maxw. on Stats. 4 sq. Lastly a most notable example of an apparent departure from the predominant spirit of charity occurs in the maxim, *Qui semel malus, semper præsumitur esse malus in eodem genere.* Thus, if A maliciously discharging a gun at B kills C, A is guilty of murder, for the malice is transferred from B to C: *Reg.* v. *Smith*, 1 Dearsl. C. C. 559 (1855). And thus also, Bayley, J. is reported to have told the jury that they were to consider the circumstance of an erasure in a certain deed, observing that a man who was capable of making an alteration in one deed might be capable of suppressing another within his power: *Doe* v. *Hirst*, 11 Price, 488 (1822). Mr. Best (Ev. 551) states that the maxim is found in terms in the Canon Law, and is thus defended from the charge of uncharitableness, by one of the Commentators:—*Regula videtur contraria charitati, quæ non cogitet malum; sed non est. Non enim charitatis est malum non cogitare in omni casu, sed tantum, cum nullum subest fundamentum, quale subest in casu regulæ.* Modern writers have, however, also attacked the maxim as contrary to natural justice and humanity: Phillimore, Principles and Maxims of Jurisprudence, 43.

These cases, then, appear to be no real departures from a spirit of charity. And many other striking manifestations of this spirit occur in criminal law, besides those already noticed. Thus although it has been questioned whether it is competent, even in extreme cases, to prove the basis of the *corpus delicti* by presumptive evidence, such evidence is always admissible, and often, especially when amounting to *evidentia rei* most powerful to disprove it: Best, Ev. 569. And the wives at least would probably agree that another instance of the same spirit is to be found in the rule laid down in *Rex* v. *Hughes* (Russ. on Crimes, Ed. 5, vol. 1, p. 147): "The law out of tenderness to the wife, if a felony be committed *in the presence of her husband*, raises a presumption *primâ facie*, . . . that it was done under his coercion." This rule, however, does not extend to crimes which are *mala in se*, nor to such as are heinous in their character or dangerous in their consequences (Best, Ev. 543). And altogether the principle of protecting people from punishment on the grounds of coercion appears very carefully guarded: Arch. Crim. Pl. 22. Ed. 11.

Other examples, immediately connected with criminal law, may be cited (1) the fact that, although in point of law, *Nullum tempus occurrit regi*, yet as matter of practice *Accusator post rationabile tempus non est audiendus, nisi bene de se commissionem excusaverit*: Moore, 817; Best, Ev. 461: (2) the fact that suddenly becoming rich is not in our criminal courts any ground for putting a party on his defence: Best Ev. 580—although 'How i' the name of thrift does he rake this together?'—may in such circumstances seem a natural thought in the minds of Judge and jury: and (3) the fact that, although it is laid down by Coke—*fatetur facinus qui fugit judicium*—yet now the evasion of justice seems

"nearly if not altogether reduced to its true place in the administration of criminal law, viz.: that of a circumstance."—*ib.* 585).

And as the law presumes against crime, illegality and dishonesty, so it presumes also against all vice and immorality and in favour of marriage. It would be out of place to speak here of the great lengths to which this presumption has been carried in Scotland, owing to the peculiar marriage law of "that remarkable country." But in one of these Scotch cases: *Breadalbane's case*, 1 L. R. H. L. S. 199, Lord Cranworth says:—"By the law of England, and, I presume, of all other Christian countries, where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a *primâ facie* presumption that they really are and have been what they profess to be." And here is found an exception which illustrates the charity and mercy of the law even more clearly than the rule itself. For where there is an indictment for bigamy, or a claim for damages against an alleged adulterer, the presumption is by no means in favour of marriage. On the contrary, in such cases, it is necessary to prove a marriage valid in all respects: *Catherwood* v. *Caslon*, 13 M. & W., 261 (1844). And the maxim *Pater est quem nuptiæ demonstrant*, and *Semper præsumitur pro legitimatione puerorum et filiatio non potest probari* (5 Co. 98, b.) are further illustrations. At one time, indeed, the presumption in favour of legitimacy was irrebuttable if the husband was within the four seas, that is within the jurisdiction of the King of England, at any time during the pregnancy of the wife, unless there was an apparent impossibility of legitimacy (Co. Litt. 244, a; Phil. Ev. 1, 472, Ed. 10). But now it may be rebutted: those however, who dispute the child's legitimacy are bound to make out the contrary: *Wright* v. *Holdgate*, 3 Car. & K. 158 (1850). And in the *Banbury Peerage case*, 1 Sim. & S. 156 (1811), it is given as the opinion of all the Judges that when intercourse has been established no evidence can be received to prove a child illegitimate except it tend to falsify the proof that such intercourse has taken place: the law will not allow a balance of evidence as to who was most likely to be the father of the child. No doubt decency, morality and policy (*see* per Lord Mansfield in *Goodright* v. *Moss*, 2 Cowp. 594), are the foundation of the whole law of marriage, but whatever the reasons for their establishment, the rules are in their *effect* of a merciful and charitable nature.

Such, too, is the effect of the strong presumption of the due discharge of their duty by public officials. Thus it is said: *De fide judicis non accipitur quæstio* (Bac. Max. Reg. 17), and *Omnia præsumuntur rite et solenniter esse acta* (Co. Litt. 232). Public officials are presumed to do their duty, and the fact of a person having acted in an official capacity is presumptive evidence of his due appointment to the office, because it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorized to fill: Tayl. Ev. 2, 178. It is obvious that public policy requires such presumptions, in order to secure the independence of public officers and prevent their being harassed by vexatious actions—see *Fray* v. *Blackstone*, 3 B. & S. 576 (1863).

But the charity of the law appears not only in the presumption against all kinds of improper conduct, but in many other different directions. Thus the law inclines strongly against penalties and forfeitures. "The law does not favour forfeitures, which will account for the very strict proof required of a landlord,

when he seeks to enforce a forfeiture and recover the demised premises, by reason of the tenant's non-payment of rent, in a case where there is a sufficient distress upon the premises": Archbold's L. & T. 122, Ed. 3, and *see* R. S. O., c. 51, secs, 59-60. So again, no one is obliged to take advantage of a forfeiture: Banning on Lim. 147; R. S. O., c. 108, sec. 10, and it is said a tenancy from year to year will not arise by implication where it will work a forfeiture. And conditions in leases being in the nature of penalties for forfeitures, the Courts keep a strict hold over them. Thus they cannot be apportioned or divided: Co. Litt. 215, a.; and so it was held that if the lessor assigned the reversion of part of the premises to another, his right of entry was gone: *Knight's case* (5 Co. 55, b.). Though as regards rent this state of the law has been altered (R. S. O., c. 136, sec. 7), and the strictness with which the Statute (32 Hen. VIII. c. 34), giving assignees the right, in certain cases, to take advantage of conditions of re-entry is construed, nothwithstanding the words "other forfeiture" in that statute, illustrates the same point (see 1 Will., Saund. 453, Ed. 1871).

The law of discovery, again, affords other examples of this inclination of the law against penalties and forfeitures. "It is," said Lord Hardwicke, "a general rule, established with great justice and *tenderness* by the Law of England, that none shall be obliged to discover what may tend to subject him to a penalty, or to that which is in the nature of a penalty: *Harrison* v. *Southcote*, 2 Ves. Sen. 389, 394. This of course is but one branch of the rule *Nemo tenetur seipsum accusare*, and the extent to which the discovery sought may affect a person, need not be shown; nor is the amount of the penalty material. A man may object to make a statement which would *even collaterally* have the effect of criminating him; nor is a person refusing to answer a question tending to affect him criminally on that account to be considered as admitting the truth of the allegation. And though the privilege is confined to penal consequences likely to be occasioned *to the party himself* (1 Sim. N. S. 329), yet an exception is allowed where evidence is sought from a wife, which may expose her husband to punishment for felony. And the right to protection from discovery can only be taken away "expressly by clear and unequivocal enactment:" per Alexander, L. C. B., *Orme* v. *Crockford*, 13 Price, 376. And even where the defendant had expressly covenanted to answer a bill of discovery, yet where the charge was a criminal one, it was held the defendant was not deprived of his right to discovery even *by agreement*. For confirmation of the above statements and cases, see Hare on Disc. (Ed 2, p. 100 sq.), who speaks of the right of protection from self-accusation, as, wisely or not, pervading every part of our system of judicial inquiry.

And in accordance with the same spirit "if the gist of an action is the injury committed by the defendant, and the right of action is once barred by time, it is impossible to revive it by admission of indebtedness; and in the case of torts no acknowledgments will suffice to avoid the express words of the statute" (Bann. on Lim. p. 40). And individuals cannot agree *inter se* that they, or some of them, shall be subject to a penalty on breach of contract, for the Courts will relieve against it (Hare, Disc. 117).

As two last examples of a charitable spirit in law may be cited, (1) the fact that want of religious belief or irreligious conduct will not be presumed. Mr. Taylor says (Ev. 1,163, Ed. 7): "Defect of religious faith is never presumed; on the

contrary, the law presumes that every man brought up in a Christian land believes in God and fears Him. The charity of its judgment is extended alike to all. . . . Neither does the law presume that any man is a hypocrite, but it presumes that he is what he professes to be, whether atheist or believer." In which respect our law contrasts favourably with the Civil law, which laid it down, that though, as a rule, in the case of crime no one should be condemned from mere suspicion, however strong, yet that where a man is suspected of heresy there is an exception, and he is condemned, *nisi omnem suspicionem excusaverit*: Best, Ev. p. 53. And (2) the maxim *Nemo præsumitur esse immemor suæ æternæ salutis, et maxime in articulo mortis* (6 Co. 76, a.), which may be one of the grounds on which dying declarations are, in cases of homicide, admitted, notwithstanding the general rule against the admittance of hearsay evidence. For this may seem to rest, in part at least, on a view of human nature endorsed by Shakespeare, where he says :—

Salis: May this be possible? May this be true?
Melun: Have I not hideous death within my view,
Retaining but a quantity of life
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here, or live hence by truth.
King John.—Act v., Sc. iv.

At the same time the care with which the reception of dying declarations is guarded, is itself no doubt prompted by consideration of the weakness of human nature: Taylor, Ev. 606 sq.

Such, then, are a few examples of the charitable and merciful spirit which seems to pervade English law. In them has been traced, however superficially, one of the principles of conduct which the practical experience of mankind, as recorded in the law books, has shown most conducive to the wise conduct of human affairs. "Human Life," says Sir W. Erle, (Law of Trades' Unions; Introd.) "is a progress between two sets of physical and moral agencies perpetually striving against each other, the one on the side of falsehood, malice, and destruction; the other on the side of truth, *kindness*, and health: and the law, if wisely made and properly administered, maintains truth and *kindness* and health, and so among other things helps persons of honest industry to obey each his own will."

F. Lefroy.

MARRIAGE AND DIVORCE.

[*Communicated.*]

As this subject has recently occupied a good deal of the attention of the public, perhaps some extracts taken from statistics and evidence, furnished to the British Parliament previous to the institution of the Divorce Court, may prove of interest.

Matrimony may be viewed either in a canonical light; or, as a legal bond or contract.

The sources of the law, administered in matrimonial cases, were pointed out in a leading case, determined in the House of Lords, by Lord Chief Justice Tindal. He says: "The Law by which "the Spiritual Courts of this Kingdom "have from the earliest time been gov- "erned and regulated, is not the general "Canon Law of Europe, imported as a "body of Law into this kingdom and "governing those Courts, *proprio vigore*, "but instead thereof, an Ecclesiastical "Law, of which the general Canon Law "is no doubt the basis, but which has "been modified and allowed from time "to time by the Ecclesiastical Constitu- "tions of our Archbishops and Bishops,

"and by the Legislature of the realm, "and which has been known from early "times by the distinguishing title of the "King's Ecclesiastical Law. That the "Canon Law of Europe does not, and "never did, as a body of laws form part "of the Law of England, has long been "settled as established Law. Lord "Hales defines the extent to which it is "limited very accurately. The rule, "he says, by which they proceed, is the "Canon Law, but not in its full latitude; "and only so far as it stands uncorrect-"ed, either by contrary Acts of Parlia-"ment, or the Common Law and Custom "of England; for there are divers ca-"nons made in ancient times and decre-"tals of the Popes, that never were here "in England."

The Council of Trent in its 24th Session (A. D. 1563), declared marriage to be a religious ceremony; but the decree was never accepted as authoritative in England.

The Ecclesiastical Commissioners in one of their reports, state: "The Canon "Law was at all times much restricted, "being considered in many respects re-"pugnant to the Law of England, or in-"compatible with the jurisdiction of "the Courts of Common Law; so much "of it as has been received, having been "obtained by virtual adoption, has been "for many centuries accommodated by "our own lawyers to the local habits "and customs of the country; and the "Ecclesiastical Laws may now be de-"scribed in the language of our Statutes, "as Laws which people have taken at "their free liberty, by their own con-"sent to be made among them, and not "as Laws of any foreign prince, poten-"tate or prelate. In addition to those "authorities of *foreign origin*, must be "enumerated also the *Constitutions*, "passed in this country by the Popes "Legates Otho and Othobon, and the "Archbishops and Bishops of England "assembled in National Council in the "years 1237 and 1269—and a further "body of *Constitutions* framed in Pro-"vincial Synods under the authority of "successive Archbishops of Canterbury "from Stephen Langton in 1222 to "Archbishop Chicheley in 1414. These "English Constitutions as they may be "termed, have been illustrated by the "commentaries of English Canonists of "distinguished learning and experience. "These commentaries will be found to "contain much valuable information on "subjects connected with the govern-"ment and history of the Church. To "the foregoing enumeration must be "added the Canons of the English Pro-"testant Church passed in Convocation "in 1603, and such Acts of Parliament "as make particular subjects matters of "ecclesiastical cognizance or regulate "the course of proceeding with respect "to the same."

These last mentioned Canons were never ratified by Parliament, although they received the Royal assent; and are not held to be binding on the Laity, though they are binding on the Clergy.

Lord Hardwicke's Marriage Act, passed in 1773, provided that marriages by minors should be absolutely void; that no marriage could be celebrated without license or publication of banns, and the presence of two witnesses—and further, that no suit should be entertained by the Ecclesiastical Courts to compel the public solemnization of a matrimonial contract, whether de præsenti or de futuro.

By the British Statute 6 & 7 W.IV. chap. 85, persons were enabled to contract valid marriages without any appeal to spiritual authority. By giving notice to the registrar and procuring the prescribed certificate, marriage may be constituted by verbal declaration, or be solemnized in the registered places at cer-

tain hours and in presence of at least two witnesses.

In 1857, the State, by 20th Victoriæ, chapter 85, resumed the jurisdiction in all matrimonial causes which had formerly been determined by the Church. The powers once vested in the Ecclesiastical Courts, and the Parliamentary prerogative of granting divorces *a vinculo matrimonii* were transferred to the "Court for Divorce and Matrimonial Causes." The Court decrees judicial separations, etc. in its character of successor to the Spiritual Courts and dissolves marriages under the powers given to it by the Statute.

The British Legislature by the establishment of the Court fully recognized the right of a married party to a divorce upon certain grounds and in particular cases.

The Law in this respect having been so fully and so long established in England, would it not be worthy of the consideration of the Dominion Government the advisability of introducing a Bill, by which jurisdiction should be given to the Judges of the Supreme Court or any number of them to determine all cases of divorce—a tribunal of such a character would afford a more speedy and less expensive remedy to an injured party than the present cumbersome and costly appeal to the Legislature, which is often influenced by considerations which do not touch the real question at issue between the parties.

J. H.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

C. C. Bruce.] [March 22.

Bruce v. Tolten.

Sale of Goods—Acceptance.

In reply to an offer by the defendants for the sale of certain wheat, the plaintiffs telegraphed, "Will take your five cars at 85 cents per bushel," to which the defendants replied by postal card on the 25th July, "Send instructions for the shipment of the five cars, spring." On the 26th, the plaintiff mailed a postal card with instructions, but this was never received by the defendants.

Held, affirming the judgment of the County Court, that the postal card sent by the defendant on the 25th July, amounted to an absolute acceptance and not merely a conditional acceptance should the defendant be satisfied with instructions he might receive as to the mode of shipment.

Robinson, Q. C., for the appellant.

J. A. Boyd, Q.C., for the respondent.

Appeal dismissed.

C. P.] [March 22.

Samis v. Ireland.

Judgment recovered for mortgage debt—Sale of equity of redemption and legal estate thereunder. C. S. U. C. c., 22, sec. 257.

Where the equity of redemption in the mortgaged land, consisting of 25 acres of a certain lot, and also the remaining 75 acres of the said lot, belonging to the mortgagor were sold to the mortgagee under a *fi. fa.* lands issued on a judgment recovered by him for the mortgage debt, and a *fi. fa.* issued out of the County Court upon the transcript of a judgment recovered in the Division Court which was inoperative against these lands, the consideration being to accept the equity of redemption and the freehold for the amount of the two writs.

Held, affirming the judgment of the Common Pleas, that although the sheriff had power under the Statute authorizing the sale of the equity of redemption, to sell the legal

and equitable estates together, the offer in question was one which he had no right to accept as equivalent to a bid for the amount of the writs, and that the sale was void.

J. K. Kerr, Q.C., and *J. A. Boyd*, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

Appeal dismissed.

C. C. Lincoln.] [March 22.

Chesney v. St. John.

Money paid under mistake—Promissory note—Evidence.

Upon a purchase of land from one Mrs. C., the plaintiff gave her a mortgage for $1,100, of which $200 was paid at the time of execution, and endorsed on the mortgage, the balance was to be paid in nine equal instalments with interest at six per cent., the first of which became due on the 7th of November, 1875. At the same time the plaintiff gave her nine promissory notes payable at intervals of one year. The first of these notes was drawn payable to Mrs. C. or bearer, one year after date, and contained the additional words "which when paid is to be endorsed on the mortgage bearing even date with this note." In August, 1875, Mrs. C. and her husband executed an assignment on general terms of this mortgage to the defendant, purporting to grant and assign all the estate and interest of Mr. and Mrs. C., in the land and the mortgage and the moneys thereby secured. In the recital descriptive of the mortgage, it was stated that, in consideration of $1,100 the plaintiff conveyed and assured the lands by way of mortgage to Mrs. C. The amount then due upon the mortgage, was not expressly mentioned in the assignment. At the date of the assignment the first note had been transferred to a third party for value. The plaintiff in ignorance of this paid it to the defendant, to whom he had been notified the mortgage had been assigned. The defendant told the plaintiff that he had not got the note, but that he would get it and give it to him. The plaintiff was afterwards sued by the holder of the note, and was compelled to pay it, whereupon he sued the defendant for the amount. The jury found that the defendant only purchased $800 of the mortgage money and eight notes: that the plaintiffs made the payment under the impression that the defendant held the note as well as the mortgage, and that when the plaintiff paid the money the plaintiff promised unconditionally to give him the note.

Held, affirming the judgment of the County Court, that the note was a negotiable instrument; and that being negotiable and having been transferred before the assignment, parol evidence was admissible to show that it had not in fact been assigned to the defendant, and that under the circumstances, the plaintiff was entitled to recover.

J.K. Kerr, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

Appeal dismissed.

Q. B.] March 22.

Parsons v. Queen's Insurance Company.

Insurance—Statutory conditions—R. S. O. c. 162.

The action was brought on an interim receipt for insurance against fire issued by the defendants after the passing of R. S. O. c. 162, which stated that the plaintiff was insured subject to all the covenants and conditions of the company.

Held, affirming the judgment of the Queen's Bench, that R. S. O. c. 162, extended to the defendants, who were a company formed under the Imperial Joint Stock Company's Act, 7 & 8 Vic. c. 110, and that the defendants could not resort to their own conditions for the purpose of defeating the claim, nor to the statutory conditions.

Robinson, Q.C., and *Small*, for the appellant.

M. McCarthy, for the respondent.

Appeal dismissed.

C. P.] March 22.

Church v. Fenton.

Sale of lands for taxes—Indian Lands—B. N. A. Act, sec. 91, clause 24—Liability to taxation—List of lands not attached to warrant, 32 Vic. c. 36, sec. 128, O.

In 1854, a tract of land was surrendered to the Crown by the Indians, to whom th

interest arising from the sales thereof by the Crown was to be paid. The lands were retained under the management of the Indian Department, and were called Indian lands and after the passing of the B. N. A. Act, still continued under the management of such Department which was under the control of the Dominion Government, "Indian and lands reserved for Indians," being by sec. 91, clause 24 of that Act, exclusively assigned to the Dominion. In September, 1857, the lot in question, being a portion of such lands, was sold by the Crown, the first instalment of the purchase money being paid on the fifteenth of February, 1858, and the last on the twenty-ninth of July, 1867, when the lot was paid for in full, and on the fourteenth June, 1869, the Patent from the Dominion Government issued therefor. In 1870 the lot in question was sold for the taxes assessed and accrued due for the years, 1864-9.

Held, affirming the judgment of the Common Pleas, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands within the meaning of the Assessment Acts and that the sale was therefore valid.

It was contended that the Ontario Legislature having repealed the Act of 1876, had after Confederation no power to levy these taxes, the land having been withdrawn from their jurisdiction; but

Held, that sec. 91, clause 24, of the B. N. A. Act, applied only to Indian lands not surrendered and reserved for their use; and moreover that this land being ratable and assessed at the time of Confederation, such liability was not affected thereby.

By the 128th section of the Assessment Act 32 Vic. c. 36, the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c.

Held, that the section was sufficiently complied with by a list, not authenticated by the seal of the corporation and the signature of the warden, attached to a warrant empowering the treasurer to sell "The lands hereinafter mentioned.

M. C. Cameron, Q.C., (*Watson* with him) for the appellants.

Reeve, for the respondent.

Appeal dismissed.

CHANCERY.

V. C. Proudfoot.] [March 5.

Thompson v. Dodd.

Practice—Decree incorrectly drawn—Setting aside sale under decree.

At the hearing a decree was pronounced declaring a deed void as against the interest reserved in favour of the grantor and his wife, and the children of a daughter of the grantor, but in drawing the decree the deed was declared void as to the children of an intended marriage of the son of the grantor, under which a sale of the trust estate was had at the instance of the plaintiff, a creditor, who had filed the bill impeaching the deed as fraudulent. The Court, under these circumstances, refused to carry out the sale, and ordered the decree to be cancelled, and a new sale had, in which the interests of the children of the marriage should be protected.

Johnson v. The School Trustees.

Varying minutes—Practice—Costs.

At the hearing a decree was pronounced in favour of the plaintiff with costs generally, but on moving to vary the minutes statements and admissions in the answer were pointed out—to which the attention of the Court had not been drawn at the hearing, which would have enabled the plaintiff to have obtained the same decree on bill and answer. The Court varied the decree by directing that only such costs should be taxed as would have been incurred by a hearing on bill and answer.

Fox v. The Toronto and Nipissing Railway Co.

Practice—Receiver.

The decree ordered payment of a sum of money by a railway company, and in default that a receiver should be appointed, from which the Company gave notice of appeal, and moved to stay the appointment of the

receiver and the enforcement of the debt until after judgment in Appeal. The Court refused the application unless security was given for payment of the debt in case the decree should be affirmed; and in any event ordered the defendants to pay the plaintiff the costs of the motion.

Pardee v. Lloyd.

Arbitration—Setting aside award—Practice—Improper conduct of arbitrator.

Where a notice had been served by one of the parties (the defendant) to an arbitration of his intention to move against the award in due time after publication, and the plaintiff thereupon served notice consenting to the award being set aside, but the defendant did not proceed with the motion, the Court, under these circumstances, held that the defendant could not afterwards set up delay as an answer to the application by the plaintiff for the purpose of having the award set aside.

Any communication between one of the parties to an arbitration and an arbitrator on the subject of the reference of which the other party and the other arbitrators were not aware, and at which they are not present, is illegal, and renders the award invalid—an arbitrator being a judge, whose duty it is to be indifferent between the parties: Therefore where it was shown that one of several arbitrators had held several interviews with the defendant pending the reference, and that the arbitrator in one at least of such interviews consulted the defendant as to the modes in which the award might be framed, and asked the defendant which he preferred, these facts being withheld from the other arbitrators, the Court set aside the award and ordered the defendant to pay the costs.

Chancellor.] [March 12.

Boyd v. Simpson.

Practice—Costs—Letter written without prejudice.

Although a letter written "without prejudice" by a party in the course of a cause cannot be read against him, it may be read by him on the question of costs in order to show that he had made such an offer as rendered the prosecution of the suit unnecessary.

Full Court.] [March 28.

St. Michael's College v. Merrick.

Practice—Costs—Liberty to move.

Held, on rehearing affirming the order reported *ante* page 18, where costs of interlocutory motions were reserved "until the hearing or other final disposition of the cause," and on a demurrer being allowed, the order drawn up directed the plaintiff to pay the costs thereof, "together with the further costs of this cause forthwith after taxation thereof;" that whether or not such interlocutory costs would fall within the definition of further costs in the cause, the omission to provide for them in the order allowing the demurrer was "a mere mistake;" and that under the general order 186 the parties had a right to apply without liberty for that purpose being reserved.

Viney v. Chaplin.—3 DeG. & J., 281, considered and acted on.

Masuret v. Mitchell.

Fraudulent settlement.

The owner of Blackacre and Whiteacre created a mortgage on Blackacre in favour of a Loan Society to secure an advance of $2,000, the estimated value of the mortgaged premises being at least $3,000. The mortgagor subsequently, being not indebted otherwise, voluntarily settled, in good faith, Whiteacre on his wife. On a bill filed by a subsequent creditor the Court set aside the settlement as fraudulent against creditors, it being shown that on an attempt to sell Blackacre, at the instance of the Loan Society, it had failed to produce the amount of money advanced by the Society, although the Loan Society was not a party impeaching the settlement. (Proudfoot, V. C., dissenting.)

Baird v. Baird.

Construction of will—Trust deed.

A testator devised his real and personal estate to his wife for life, for the benefit of herself and their children, and directed that,

upon the death of the widow, his property should be equally divided among the children. *Held*, that only such of the children as survived the widow were entitled to participate in such partition of the estate; and one of the sons, as personal representative of the testator, having purchased land with the moneys of the estate, and executed a declaration that he held the lands so purchased (except as to his own interests) in trust only for the other parties interested under the will, and afterwards died during the life of his mother, *Held*, that his children were not entitled to any share in such land, the only persons entitled being such of his brothers and sisters as should survive their mother.

V. C. Proudfoot.] [March 26.

Green v. The Provincial Insurance Company.

Deposit by insurance companies—Parties entitled to claim thereon in case of insolvency of company.

Held (affirming the report of Mr. Harvey, the assignee of an insolvent insurance company) that where an insurance company had been licensed under the 31 Vict., cap. 48, to transact fire and inland marine insurance business, although its original charter authorized the transaction of fire and marine insurance, without distinction of ocean from marine, the holders of ocean marine policies, though resident in Canada, were not entitled to rank as creditors in the fund deposited with and remaining in the hands of the Government, in the event of the company becoming insolvent.

Chancellor.] [April 2.

Munro v. Smart.

Married Women—Wills' Act—Power of married woman to devise to one of her children.

Held, that under the R. S. O., ch. 106, sec. 6, a married woman cannot devise or bequeath her separate property to one or several children to the exclusion of others.

Campbell v. McDougall.

Mortgagor and Mortgagee—Notice—Priority.

In October, 1863, the owner of real estate created a mortgage thereon in favour of J. M., to secure $20,000, which was duly registered the day of its execution, and was in 1875 assigned to a bank to secure a liability of the mortgagee, there having been a prior mortgage on the same estate, created in 1861, securing $4,000. In 1866 another mortgage was created in favour of the plaintiff for $4,000, which was intended to be substituted for the prior mortgage for that amount, and the money obtained thereon was applied towards the payment thereof, J. M. giving a written consent that the latter mortgage should have priority to his own, notwithstanding its prior registration, such consent not being registered. The mortgaged estate proved insufficient to pay the mortgage assigned to the bank, who had taken the assignment thereof in good faith and without notice of J. M.'s consent to be postponed to the plaintiff. *Held*, that these circumstances did not create an equity in favour of the plaintiff to call upon J. M. to make good his loss by reason of his neglect to notify the bank of his priority. The case of *Slim* v. *Croucher*, 2 Giff. 37, considered and distinguished.

Peck v. Powell.

Sale of patent—Specific performance.

C. P., who had been for some time carrying on the business of pump-making, in partnership with B. & C., was the holder of a patent for an improved pump, which would expire on the 19th of July, 1877, but was renewable under the Patent Act for two further terms of five years each. On the first of June, 1877, C. P. agreed to sell to the defendant Peck his interest in such partnership business, together with the land and buildings in which it was carried on, for $4,500; and by the instrument evidencing the agreement executed on the 23rd of June, he agreed "to assign his interest in his pump patents to Mr. Peck, for the counties of," etc. After the expiry of the patent (19th of July, 1877), C. P. filed a bill seeking to enforce payment of $3,000 balance of purchase money due in respect of the sale of his interest in the partnership and of the right as before stated, insisting that all he had sold or intended to sell was his interest in the then current patent; one object

which he had in view in so doing it was found, being to prevent them as assignees afterwards disputing the validity of any renewal of the patent, although it was shown n evidence that C. P. in speaking of the patent he held said it was good for ten years. The Court being of opinion that what the defendants intended to purchase was the right for ten years, and that the belief that they were purchasing such right was induced by the representation of C. P., who knew how the fact was, and was therefore bound to specifically perform the agreement by executing such an assignment as would effectually convey the right for the counties named, whether at the time of the original contract the patent was really good for ten years or afterwards became so, made a decree for that relief at the instance of Peck and his partners in a suit instituted by them for that purpose, and ordered C. P. to pay the costs of both suits, the Chancellor in disposing of the case remarking:—"It does not appear to me to be very material whether the ground for relief be placed upon representation or contract. If in fact the patent held by Powell were not good for ten years, and he stated that it was so, Peck dealing with him upon the faith of what he stated being true, it falls under the old head of equity that he was bound to make good his representation, for he knew how the fact was, whether it is to be taken to be false or true. If, on the other hand, his statement that his patent was good for ten years was true, and he agreed to assign a certain interest in that patent good for ten years, it was a matter of contract, and the other party to that contract is entitled to call for its performance."

Chancellor.] [April 9.

Barrett v. Merchants' Bank.

Lessor and Lessee—Notice to quit—Joint tenants—Judicial acts—Priority of acts.

A. B. created a lease in favour of C. W. and W. W., brothers and partners in trade, of certain premises in Toronto in which the partnership business was carried on, reserving the right to the lessor of determining the lease by giving six months' notice, "limited to the act of A. B. himself or his certain attorney." A notice, for the purpose of determining, was, during the currency of the lease, served by A. B., which was in ample time, but was served on W. W. only, who signed an admission of service for himself and C. W., who was at the time absent from the Province, but the fact of such service it was shown had been communicated to him by his brother, whether within the six months or not did not appear. *Held*, sufficient within the terms of the lease.

On the same day, but subsequent to the service of such notice, a writ of attachment in insolvency issued against the firm, of which A. B. was a member. *Held*, notwithstanding the rule that a judicial act relates back to the earliest moment of the day on which it is done, that the notice so given by A. B. was effectual.

Chancellor.] [April 16.

Pressey v. Trotter.

Mortgage—Mortgagor and mortgagee—Assignee of mortgage security—Costs.

Under the facts appearing in the report of this case in 26 Grant, page 154, the Court on further directions refused to allow the plaintiff, Mrs. Pressey, costs against the assignee of the security, although it was shown on taking the accounts in the Master's office that the mortgagee was indebted to her husband at the inception of the mortgage in a sum exceeding that mentioned in the mortgage, restricting her right to recover her costs from the mortgagee alone, though, had the mortgage money been satisfied by payments, costs would have been given against the assignee as well.

Chancellor.] [April 16.

Henderson v. Henderson—
Re Henderson.

Administration suit—Staying proceedings of a creditor suing at law—Costs.

The Court in making an order to stay the proceedings of a creditor, who had instituted proceedings at law to recover his demand, after an order for the administration of the estate had been obtained in this Court, ordered the creditor to receive his costs; the creditor and his attorney in the action

both swearing that at the time of suing out the writ they were not aware of the pendency of the administration suit— although it was shown that a year before they had been notified of it—there being no reason to doubt the *bona fides* of their conduct.

QUEEN'S BENCH.

VACATION COURT.

Cameron, J.] [March 18.

In re Bush and the Corporation of the Village of Bobcaygeon.

Appeal to Quarter Sessions—Order as to costs—Mandamus.

Under 32-33 Vict. chap. 31, sec. 65, as amended by 33 Vict. ch. 27, sec. 1, sub-s. 3, the Court of Quarter Sessions, at which an appeal is heard must determine, on quashing a conviction, whether any and what costs are to be paid, and when.

When, therefore, the only order made was, "Conviction quashed with costs," *Held*, that no subsequent session of the Court could interfere by way of amendment of the order or otherwise; and a *mandamus* to the Chairman and Clerk of the Sessions to issue the said order, with a provision for payment by the respondents to the appellant of the costs of the appeal forthwith after taxation, was refused.

Marsh, for applicant.

Devlin, contra.

Cameron, J.] [March 18.

In re Grand Junction Railway Company and Masson.

Arbitration and award—Time for moving against—R. S. O. ch. 165, sec. 20, sub-s. 19.

An award against a railway company under R. S. O. ch. 165, was made on the 15th January, and a copy served on the secretary on the 22nd day of the same month. On the 18th of February an application was made to set aside the award, the only material filed upon the motion being a copy of the award and an affidavit, merely stating what one of the arbitrators had informed the secretary of the company were the items constituting the sum awarded, but the evidence given before the arbitrators was not brought before the Court, except in the shape of a statement as to it made on the 7th of March by the claimant under the award, on shewing cause to the rule to set award aside.

Held, that the application was not an appeal under R. S. O. ch. 165, sec. 20, sub-s. 19, there being no evidence brought before the Judge to enable him to decide any questions of fact, but the old ordinary application to set aside an award, and that such as it was too late, the time for so doing having expired on the 15th February. *Quære*, whether service of a copy of the award was a sufficient notice thereof under the statute; but *held*, that even if so, the only evidence of what took place before the arbitrators not having been produced in court for more than a month after such notice, the time allowed for *appealing* had expired.

H. Cameron, Q.C., for applicant.

Masson, contra.

Cameron, J.] [March 25.

Campbell v. Peek.

Award—Uncertainty—Submission—Construction.

Held, that the terms of the submission to arbitrators in this case set out below did not warrant the arbitrator in considering or deciding whether any re-conveyance ought to be made by the vendee to the vendor. *Held*, also, that the award was not bad for uncertainty, for not having ascertained the amount of money to be retained by the vendee.

Maclennan, Q.C., for applicant.

Delamere, contra.

Cameron, J.] [March 25.

In re the Goods of Thomas Cockburn Kerr, deceased.

Mercantile firm—Deceased partner—Probate fees.

For the purpose of taking out probate and paying fees thereon, the representative of a deceased partner in a mercantile firm must be taken to be interested in the corpus of the partnership effects to the extent of the

share of the deceased, undiminished by the debts and liabilities of the firm.

J. K. Kerr, Q.C., for applicant.

McKelcan, Q.C., contra.

Armour, J.] [March 28.

Regina v. Hiscox.

Livery-stable keeper—License—Conviction quashed.

Since the repeal of C. S. U. C. ch. 54, the 31st sub-s. of sec. 294, and which empowered the councils of cities to pass by-laws for regulating and licensing the owners of livery-stables, and the transfer of that power under subsequent legislation to the Board of Police Commissioners, by-laws previously passed by City Councils for such purpose are no longer in force, and a conviction for keeping a livery-stable without license in contravention of a by-law so passed by a City Council was, therefore, quashed.

F. Osler, for applicant.

Ferguson, Q.C., contra.

Hagarty, C. J.] [April 8.

Grant v. Reliance Mutual Fire Insurance Company.

Insurance—Interim receipt—Insurance subject to conditions of policy—Termination of risk—Pleading.

In an action on an interim fire insurance receipt, reciting that plaintiff had paid a certain sum for a three months' insurance, subject to the approval of the directors, and that the property should be held insured for 30 days from date, unless notified to the contrary, but that the insurance thereby made was subject to all the conditions, &c., contained in and indorsed on the printed forms of policy in use by the company, the company pleaded that before the expiration of the 30 days, and before the loss, they notified the plaintiff that the property could not be held insured by them.

On the printed form of policy in use by the company was indorsed the 18th statutory condition, providing that the insurance might be terminated by the company by giving ten days' notice to that effect, and by repaying a rateable part of the premium for the unexpired term, and that the policy should cease after the expiration of ten days from the receipt of such notice and repayment.

Plaintiff replied to defendants' plea, setting up this condition, and alleging that the notice referred to in the plea was not given ten days before the loss, and that there had been no repayment of a rateable portion of the premium for the unexpired term of insurance.

Held, on demurrer, that the replication was good, and that defendants were bound to give the ten days' notice and return a rateable portion of the unearned premium before they could terminate the risk.

Black, for the demurrer.

Clarke, contra.

Hagarty, C. J.] [April 15.

Re Lloyd & Corp. of Aldershot.

By-law—Omission—Refusal to quash.

The Court, in the exercise of its discretion, and following *Grierson* v. *Corporation of Ontario*, 9 U. C. R. 623, and other similar cases since decided, refused to set aside a railway aid by-law, good on its face and which it considered to have been passed in good faith, merely because of the unintentional omission therefrom of the statement of an existing debt of about $2,700, the assessed value of the property of the municipality being about $1,500,000.

H. J. Scott, for applicant.

R. Smith (of Stratford), contra.

COMMON PLEAS.

IN BANCO.

March 25.

Niagara District Mutual Fire Insurance Company v. Gordon.

Mutual Insurance — Alienation of insured property.

Sec. 41 of R. S. O., ch. 161, provides that "in case any property real or personal is alienated by sale, &c., the policy shall be void, and shall be surrendered to the directors of the company to be cancelled, and thereupon the assured shall be entitled to receive his deposit note or notes, upon pay-

ment of his proportion of all losses which have occurred prior to such surrender."

Held, that under this section the alienation by sale, &c., of the insured property avoids the policy wholly, so as to deprive the assured of any remedy thereon, and enables him upon payment of all prior losses and surrendering the policy to be cancelled to relieve himself from further liability.

Mackelcan, Q.C., for the plaintiff.

J. E. Rose, for the defendant.

March 28.

Knowlton et al. v. Mackay.

Agreement to pay a named sum of money for not buying goods—Liquidated damages or penalty.

Declaration: that, by agreement under seal, the defendant agreed on or before the 15th of July, 1878, to manufacture into pot barley, and to store for plaintiffs certain barley of the plaintiffs, and on said date to purchase said barley and pay therefor the sum of $785, alleging a delivery of the barley to the defendant, and the performance of all conditions precedent to entitle the plaintiff to a fulfilment of said agreement, yet that defendant did not manufacture or store said barley, or pay for same on, before or since said date; that by said agreement it was further provided that in case defendant did not pay the said sum of $785 on the said date, defendant should pay the plaintiffs the sum of $100, as liquidated damages, by reason whereof the defendant has become liable to pay the said sum of $100, as in the agreement mentioned, and averring non-payment.

Held, declaration good: 1, that the question could not properly be raised by demurrer, for the plaintiffs were entitled to some damages; and 2, that the $100 so agreed to be paid was not a penal sum for forfeiture for not paying money due, or for any ordinary debt or claim, but liquidated or agreed on damages for one single breach of a contract for not buying at a named price goods of a fluctuating and uncertain value.

Browning (of Dundas), for the plaintiffs.

Mackelcan, Q.C., for the defendant.

COMMON LAW CHAMBERS.

Davis v. Dennison.

Hagarty, C. J.] [March 14,

Dower—Death of tenant—Scire Facias.

In an action for dower, the plaintiff recovered judgment for her dower, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant.

Held, that the plaintiff must proceed by *scire facias*, and not by suggestion or revivor.

Blackstock, for plaintiff.

Creelman, for defendant.

Rogers v. Manning.

Hagarty, C. J.] [March 5.

Evidence—Commission—Further examination of witness.

Held, that if a witness who has been previously examined under a commission states on affidavit that he has further evidence to give to explain or correct his former evidence, a new commission may issue to further examine him, and in such case he is to be considered as a witness for the party who so desires to re-examine him.

Held, that strong suspicion of a depraved motive in the witness who desires to be re-examined is not a sufficient ground upon which to resist the application.

Biggar, for plaintiff.

Shepley, for defendant.

McCleary v. Morrow.

Mr. Dalton.] [March 28.

Old issues—Notice of trial—Term's notice to proceed.

In an old issue where no proceeding has been taken in the cause for a year subsequent to issue being joined, the plaintiff must give a term's notice of his intention to serve notice of trial.

Armour, for plaintiff.

Langton, for defendant.

THURSTON v. BEARD.

Hagarty, C. J.] [March. 28.

Pleading—Replevin—Form of counts—Replevin Act.

In an action of replevin, the sheriff replevied part of the goods, and certified in his return to the writ that the remainder had been eloigned to places to him unknown before the writ came into his hands. The plaintiff declared in two counts :—1. For that the defendant unjustly detained the goods of the plaintiff, specifying the goods replevied, until, &c. 2. For that the defendant unjustly detained, and still detains, against sureties and pledges, the goods of the plaintiff, specifying the goods eloigned.

Held, under R. S. O., ch. 53, sec. 24, that the second count is good.

Aylesworth, for plaintiff.

Ward, for defendant.

McDONALD v. McKINNON.

Mr. Dalton.] [April 14.

Pleading—New assignment—Time to plead.

Held, that a defendant has only four days to plead to a new assignment.

Aylesworth, for plaintiff.

H. J. Scott, for defendant.

CHANCERY CHAMBERS.

Referee] [Feb. 24, '77.

VARS v. GOULD.

Security for Costs—Trustee—Assignee in Insolvency.

An assignee in insolvency *bona fide* suing in the discharge of his duty as such assignee will not be required to give security for costs on the ground that he is without means and not beneficially interested in the suit.

Referee and [Feb. 8.
Blake, V.C.] Mar. 17.

McDERMID v. McDERMID.

Sale under decree—Purchase money—Payment into Court.

On a sale under a decree the purchaser, except under special circumstances, will not be compelled to pay his purchase money into court until he has accepted or approved of the title, or the Master has reported that the vendor can make a good title.

Referee and [Feb. 25.
Proudfoot, V.C.] Mar. 3.

CRUSO v. CLOSE.

Costs—Deposit by defendant on sale—G.O. 428, 429, 436.

Where a defendant by bill in a foreclosure suit demanded a sale, and paid $80 into court as a deposit,

Held, that although the costs of the sale would exceed that amount, the defendant could not be ordered to increase it, the amount being fixed by Schedule S. endorsed on the office copy of the bill under Order 436.

Referee—Spragge C.] [March 1.10.

SHELLEY v. GORING.

Married woman—Next friend—Practice.

Where a married woman files a bill in respect of property acquired by her after the passing of 35 Vict., c. 16 (the 2nd day of March, 1872), she is not, though married before that date, required to sue by a next friend.

Leave was given to strike out the name of a next friend, where one had been named by mistake, and an order had been obtained requiring security for costs.

Proudfoot, V. C.] [March 3.

RE ARNOTT.

CHATTERTON v. CHATTERTON.

Partition under General Order 640—Reference—Jurisdiction of Referee.

Under G. O. 640, where special circumstances are shewn on an application for partition or sale of lands, a reference to a Master other than the Master in the county town of the county where the lands are situate will be directed.

The application under the order should be made to a Judge in Chambers.

The Master—Spragge, C.] [March 7.

HYNES v. SMITH.

Mechanics' Lien Acts—Priority of encumbrancers.

Work was] commenced by a contractor

before the 31st December, 1877, and two mortgages made by the owner were registered against the property, one on the 31st May and the other on the 8th June, 1878. On the 18th June, 1878, the contractor registered his lien, and on the 28th August, 1878, filed his bill, not making these mortgagees parties, and obtained a decree with a reference.

The Master in Ordinary refused to make the mortgagees parties in his office, holding that they were prior not subsequent encumbrancers.

On appeal, *ex parte*,

SPRAGGE, C. upheld the master's ruling.

Blake, V.C.] [Mar. 18.

PORTE v. IRWIN.

Decree for sale.

Where a decree directed a sale of certain property at the expiration of a year from the date of a Master's report, a sale at the end of a year from the date of the decree, instead of the date of the report, was allowed under special circumstances on the ground that the decree was in effect equivalent to a judgment at law.

Referee] [Mar. 20

BUTLER v. STANDARD INSURANCE CO.

Appeal—Stay of proceedings in Master's Office—Practice.

Where a decree has been made declaring the plaintiff entitled to insurance moneys and directihg a reference to ascertain the amount and payment forthwith after the making of the report; an order staying proceedings in the Master's Office was refused pending an appeal from the decree.

Proudfoot, V. C.] [March 24.

BURN v. GIFFORD et al.

Expenditure of trustee on trust property—Priority in regard thereto.

When certain persons advanced money to complete building a yacht, and scrip under seal was executed, declaring that one G. was to hold the yacht in trust as security for such advances, and G. expended certain sums for running expenses in taking the yacht to a race.

Held, The expenses not being impeached as improper, that G. was entitled to a first charge on the proceeds of the sale of the yacht for these expenses.

Referee—

Spragge C.] [March 25-31.

COLLVER v. SWAYZIE.

Jurisdiction of Referee—Appointing representative ad litem—R. S. O., c. 49, s. 9.

A motion made under R. S. O. c. 49, s. 9 to appoint an administrator ad litem of the estate of a deceased person, may be made before the Referee, as that section merely extends a jurisdiction already possessed by him under G. O. 59.

Spragge, C.] [April 2.

BUILDING AND LOAN ASSOCIATION v. CARSWELL.

Married woman—Dower in equity of redemption—Ont. Stat. c. 42 sec. 22.

When the wife of a mortgagor is a party to and bars her dower by the mortgage, she is not improperly made a party defendant to a bill for foreclosure under the mortgage, since the coming into force of above statute, on the 11th March, 1879.

Spragge, C.] [April 21.

BLAYLOCK v. MCFARLANE.

G. O. 642—Time for appeal from Master's report—Mistake of solicitor.

A Master's report was dated 6th March. On April 2nd a notice of motion was served for leave to appeal therefrom, on the ground that the solicitor was not aware of the new orders passed on the 10th January, 1879, and that he did not know report was made till 31st March, and therefore this was a proper case for the Court to exercise its discretion in his favour.

SPRAGGE, C., dismissed the application with costs.

CANADA REPORTS.

ONTARIO.

ELECTION CASE.

DISTRICT OF ALGOMA.

Reg. ex rel. Londry v. Plummer.

Jurisdiction of County Judges of Algoma to try Controverted Elections—Qualification of Councillors under Rev. Stat., cap. 175—Disqualification on the ground of holding license to sell liquors.

[Sault Ste. Marie, Feb. 24.

The statement of the relator was to the effect that he and the defendant were both nominated as candidates for the Reeveship of the Municipality of Sault Ste. Marie, on the 30th day of December last. That at the said nomination he, the relator, caused a notice to be publicly read by the returning officer protesting against the eligibility of the defendant to be elected and act as such reeve, on the grounds that he was a shopkeeper licensed to sell spirituous liquors by retail, and therefore disqualified under the 74th section of the general Municipal Act, and that all votes cast for the said defendant would be thrown away; and that he, the relator, would claim to be duly elected to the said office of reeve, although the said defendant should have a majority of votes cast for him.

On the return of the summons of *quo warranto* it was admitted on both sides that they both went to the polls, and that the defendant was declared duly elected by a majority of forty votes.

The relator claimed the seat.

The relator appeared in person.

Hamilton, for the respondent, contended:

1. That no power is conferred upon the Judge of the District of Algoma by cap. 174 or 175, Rev. Stat., to try controverted elections.

2. That the relator discloses no legal objections to the validity of the election of the defendant to the reeveship of Sault Ste. Marie, which is a municipality created under cap. 175, Rev. Stat., into which Act the disqualification clauses relied on by relator —sec. 74, Rev. Stat. cap. 174—is not incorporated.

3. That cap. 175, governing municipalities in Algoma, &c., contains no disqualifying clause other than a property disqualification.

McCrea, Co. J.—On the argument it was urged on behalf of the defendant that under Rev. Stat., cap. 175, I had no power to grant *fiats* for municipal summonses, or try contested election cases in the District of Algoma, on the ground that stipendiary magistrates had none, and the 54th section of the Act only empowered me to do what might be done by such magistrate; and the 55th section only further enabled me to decide as to the validity of any by-law or resolution or order of any municipality in the District of Algoma.

The 18th section of the Act, speaking of "the Municipal Act," says: "The provisions of the said Act relating to township municipalities and their officers shall apply to the municipalities erected under this Act, except where inconsistent with this Act."

The 45th section enacts that, "The provisions of law for the trial of controverted elections applicable to councillors of townships in counties shall apply to the members of the council of any municipality formed under this Act."

These sections seem broad and full enough to make the councillors amenable to "The Municipal Act," and to give me the same powers to try contested elections as given by it to the judges of counties. It seems to me it could not be fuller unless indeed all the restricting and empowering clauses of "the Municipal Act" were imported into our constituting one; and surely the giving me additional powers as by the 54th and 55th sections is done, cannot be held to curtail or entirely sweep away those given me in other portions of the Act. I must therefore hold that my jurisdiction is complete.

In like manner it was contended on the part of the defendant that the 18th section of cap. 175, Rev. Stat., did not extend to

the qualifications and disqualifications of councillors under "the Municipal Act," because the 38th section fixed a property qualification and was silent as to disqualifications. This point, however, it will not be necessary to decide for reasons which will presently appear.

Our constituting Act, cap. 175, Rev. Stat., is the 35 Vict., cap. 37, and was passed on the 2nd day of March, 1872.

At that time shopkeepers licensed to sell spirituous liquors by retail were not disqualified from being elected and serving as councillors by any law.

On the 23rd day of March, 1873, the different Municipal Acts of Ontario were consolidated by 36 Vict., cap. 48, and then, for the first time, such shopkeepers were disqualified, by section 75 of that Act, to be a member of the council of any municipal corporation. This clause is now the 74th one of the Rev. Stat., cap. 174, known as "the Municipal Act." But the 514th section of the 36 Vict., cap. 48, enacts as follows: "Nothing herein contained shall affect the Acts of this Province passed respectively in the 33rd and 35th years of the reign of Her Majesty for establishing municipal institutions in the District of Algoma, Parry Sound, Muskoka, Nipissing and Thunder Bay, but the same shall be construed as if the provisions of the Acts herein referred to remained unrepealed, and as if this Act had not been passed."

This clause, though in a much shorter form, is the 597th clause of cap. 174, Rev. Stat., "the Municipal Act." But by the 10th section of chapter 6 of the Revised Statutes of Ontario, it is enacted that "they shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted."

Now if it were conceded on the part of the defendant Plummer that the 18th section of cap. 175, Rev. Stat., which is the 35 Vict., cap. 37, sec. 18, did, in fact, import into it all the disqualifications of councillors contained in the general Municipal Act, yet from a consideration of the above named Acts, it is evident that it must be taken as it stood on the 2nd day of March, 1872, when the 35 Vict., cap. 37, was passed, and not as the disqualification now stands. But we have seen that shopkeepers licensed to sell spirituous liquors by retail were then not disqualified, the defendant is, therefore, eligible to be elected and serve as reeve of "the Municipality of Sault Ste. Marie;" judgment will be for him accordingly, and the relator must pay him his costs.

CHANCERY CHAMBERS.

RE C. AND L., SOLICITORS.

Solicitor and client—Agreement—R. S. O. c. 140, sec. 40—G. O. 595.

Where it is a matter of dispute whether there has or has not been an agreement between solicitors and client as to costs, an order for delivery and taxation should be applied for on motion and not on præcipe.

[Mr. Stephens, Jan. 10-14, 1879; Proudfoot, V. C., March 3, 1879.

In May, 1878, in an alimony suit of Purcell v. Purcell, a consent decree was made directing payment of a sum of money to trustees for the benefit of the plaintiff, Isabella Purcell, and containing a separate clause ordering the defendant to pay the plaintiff's solicitor $1,000. The latter clause made no reference to the purpose for which the money was to be paid to the solicitors. The solicitors asserted that this sum was fixed upon as an amount to be paid by the defendant for their costs of suit, and for other charges connected with the matter. Mrs. Purcell, the plaintiff, contended that the solicitors should only receive out of the $1,000 their proper costs, and that the balance, if any, should be paid over to her, and conceiving herself to be entitled, as a matter of course, on Sept. 2, 1878, she took out an order on *præcipe* for the delivery and taxation of the bill.

Cattanach now moved, on behalf of the solicitors, to set aside this order on the ground (1) that there was a substantial question in dispute between them and Mrs. Purcell, and the order could not be properly granted on *præcipe*, *ex parte* and without notice. (2) Certain material facts were

withheld on making said order, as, *e. g.*, that pending negotiations for a settlement it was specially agreed between Mrs. P. and the solicitors that the latter should look to the defendant alone for their costs and make any arrangement they chose with him, and that accordingly the solicitors arranged with the defendant that they should receive $1,000 under the decree for their costs, and that Mrs. P. expressly assented to this arrangement. He cited *De Feuchères* v. *Dawes*, 11 Beav. 46, Morgan and Davey's costs in Chy., 314-5; *Gillespie* v. *Shaw*, 10 U. C. L. J. 100; *Re Greenwood ib.* 131.

Bain, contra—(1) The order is *primâ facie* good under R. S. O., c. 140, sec. 40, the onus of proving the loss of the client's right resting with the solicitors, and they have not made out any such agreement as would disentitle Mrs. P. to the order for delivery and taxation: *Re Ingle*, 21 Beav. 275; *Re Whitcombe*, 8 Beav. 140; *Re Carven ib.*, 436; nor have any special circumstances been shown to render necessary a special application for an order for taxation. (2) The decree drawn by the solicitors themselves is silent as to what is to be done with the $1,000, and nothing is said as to costs. (3) Even if the order was improperly issued *ex parte*, now, having been heard, the order should be allowed to stand as in *Re Ingle*, *ubi sup.*

Cattanach, in reply—There was undoubtedly an understanding about the $1,000, and whether binding or not the order could not in such case be issued *ex parte*: *Re Fitch*, 2 Ch. Ch. 288. If all the circumstances had been disclosed the order would not have been so made, and, therefore, it should be set aside, and the solicitors be placed in a position of defence instead of attack: *Read* v. *Cotton*, 6 U. C. L. J. 114.

The Referee held that the order for taxation should have been applied for on motion and on notice, and granted the order asked.

The question of costs was afterwards discussed. Mrs. P. did not apply for the order by her next friend, and the question was whether any and what order could be made against her, she being a married woman. Finally, the learned Referee, on the authority of *Lawson* v. *Laidlaw*, 3 App. 77, ordered that the order be discharged, "with costs to be taxed by the Master and to be paid out of the separate property of the said Isabella Purcell, which is, at the date hereof, vested in the said Isabella Purcell, or in any other person or persons in trust for her, with which said sum, when so taxed, the said separate property is hereby charged."

On appeal from this decision—

Bain, for the appellant, urged the same arguments and cited the same cases as before. He also maintained that *De Feuchères* v. *Dawes*, the case on which the Referee based his judgment, was different from this. There there was a settlement for costs binding on the parties, here there was no arrangement or agreement which could be contended to be binding on the client, nor by which the client was released from liability to the solicitor.

Proudfoot, V. C., held that all the Referee had determined was that the order for delivery and taxation should have made on motion. It is not necessary, said the learned Vice-Chancellor, to determine whether the plaintiff is or is not entitled to any balance which might remain of the $1,000 after the taxation of the Bill. All that it is necessary to determine is that the facts in this case should have been presented to the Court before the order of taxation was granted.

Appeal dismissed with costs.

IN THE COUNTY COURT OF THE COUNTY OF YORK.

Kerstman et al. v. King.

Land Agent—Acting for vendor and vendee at same time—Commission.

If an agent employed on a commission for the purchase of real estate receive or agree to receive from the vendor any remuneration or commission contingent on the sale of the property, he acts in contravention of his duty to his principal, and forfeits his right to commission from the latter.

[Mackenzie, Co. J.—Jan. 24, 1879.

This was an action brought by the plaintiffs as land agents against the defendant, for whom they were acting in the proposed purchase of a house and lot.

The plaintiffs declared for money payable by the defendant to the plaintiffs, for work, journey and attendances of the plaintiffs, by them done, performed and bestowed, as the agents of the defendant, and otherwise for the defendant, and for the commission and reward due from the defendant to the plaintiffs in respect thereof, &c.

Pleas.—Never indebted and payment.

The case was tried before His Honour Judge Mackenzie without a jury, on the 19th November last, when he directed a verdict for the plaintiffs for $150, reserving leave to the defendant to move the court to enter a verdict or nonsuit for him if the court should be of opinion that the plaintiffs are not entitled to recover.

At the trial the contest was whether the plaintiffs were entitled to recover $150 commission on the alleged purchase of certain property in Rosedale. Contradictory evidence was given in regard to the terms of the purchase and the payment of commission. One of the plaintiffs gave evidence to the effect that he purchased the property for the defendant, and that the defendant was to pay them, the plaintiffs, $150 commission. The defendant swore that he instructed the plaintiffs to purchase a house in Rosedale on conditions that they should get for him a builder's certificate of the house that it was properly built, and that they should get for him a written certificate of the value of the land, and of the condition of the house which stood on it, from some competent valuator and builder. They did not get these certificates.

It appeared also that the vendors were to pay a commission or premium to the plaintiffs for getting a good purchaser.

The plaintiffs admitted that they were to get $100 from the vendors, but said it was not as a commission, and that they intended to credit the plaintiff in their account against him for whatever they were paid by the vendor.

On the 7th February, 1878, the plaintiffs sent a telegram or cable message to the defendant—"one thousand dollars thirty days, balance in four months." On the following day the defendant sent the plaintiffs a cable message, containing one word, "close." This word had reference to the message of the previous day and previous understanding.

On the same day, the 8th February, 1878, the plaintiffs wrote the vendors the following letter :—

"We are now prepared to close for the above property, subject to the terms already agreed upon, on condition that you pay us the usual commission which amounts to $150."

On the 13th February aforesaid the vendors sent the following communication to the plaintiffs :—

"Your offer of $7,000 net to us, free of all legal expenses, for the White House, Yorkville, we accept, and will give you $100 commission. We cannot at the moment say when we shall be able to give possession, but we expect almost immediately. Our solicitors in the matter are Messrs. ————."

One of the plaintiffs in his evidence said "they, the vendors, agreed to give me $100. It was on the 7th February he (Mr. Cassels) agreed to give me $100 commission. I did not cable King that Cassels was paying me a commission. I asked Mr. Cassels for $150 commission. He said he would not pay it. $100 was verbally agreed on."

The defendant swore that he understood the plaintiffs were acting for him alone, and if he supposed they were not doing that, he would not have employed them.

In January Term, *O'Brien* for the defendant, obtained a rule to set the verdict aside, and to enter a verdict or nonsuit for the defendant pursuant to leave reserved, and the Law Reform Act.

Jas. Robertson—The verdict was right. (1) The evidence does not show the obtaining certificates to be a condition precedent, and the defendant having repudiated the contract must pay for the services rendered. It was to the defendant's interest that the commission should be divided. It was the plaintiffs' intention to relieve the defendant of commission to the extent of the amount they should receive from the vendors.

O'Brien supported the rule. (1) All the services required of the plaintiffs, who were acting solely for defendant, were not performed, and they did not obey his instructions. The defendant repudiated the contract for sufficient reason. Story, ss. 8, 211, 329, 344; Evans, 325, 336, 342, 351. (2) There was misconduct and violation of duty on the part of plaintiffs, as agents of defendant, in taking any remuneration as commission or otherwise from the vendors, without the defendant's knowledge and consent: *Salmon* v. *Pender*, 3 H. & C. 642; *Morrison* v. *Thompson*, L. R. 9 Q. B. 480; *Raisin* v. *Clark*, 41 Maryland Rep. 158; 10 Am. Law Rev. 363; and see Wharton, 336, Evans, 345, Bishop, 337, Snell, 457, 466.

MACKENZIE, Co. J.—It looks something like this, that the plaintiffs were charging the vendors $150 commission for getting a purchaser for the property in question, and claimed $150 commission from the defendant as purchaser. They were to get a commission from the one party for one thing, and from the other party for another thing, in respect to this property.

In *Salmon* v. *Pender*, 3 H. & C. 636, the Court of Exchequer held that an agent employed to sell land in which he was interested as a shareholder, was entitled to no commission from his employer in respect of the sale. *Morrison* v. *Thompson*, L. R. 9 Q. B. 480, has also been referred to. In the American case of *Raisin* v. *Clark*, 41 Maryland Rep. 158, the plaintiff, a real estate broker, was employed by one Cooper to sell a farm. He advertised it, and the defendant, seeing the advertisement, applied to him, and proposed to exchange for the farm a house in the city. The exchange was made, and the plaintiff received from Cooper his commission of two and a-half per cent., of the value of the property exchanged. He demanded a like commission from the defendant, and brought the action to recover it. This claim was placed upon two grounds: (1) An express agreement with defendant; (2) An alleged usage among brokers in Baltimore to charge each party, upon exchange of real estate, a commission of two and a-half per cent. The Court of Appeal held that he was not entitled to recover upon either of these grounds. It being conceded that he was Cooper's agent to sell the farm, and that the alleged agreement, if made at all, was entered into while this employment continued, he could not lawfully become the agent of the purchaser. It is a general rule, that a person cannot, in an agency of this kind, act as agent or broker for both persons in the same transaction, because there is a necessary conflict between the two interests; and the law will not allow an agent of the vendor, while his employment continues, to assume the essentially inconsistent and repugnant relation of agent for the purchaser. In the present case, from the oral evidence and the letter of the plaintiffs of the 8th Feb. to the vendors, the plaintiffs were acting for the vendors, and charge them with "the usual commission which amounts to $150. See also *Fawnsworth* v. *Hemmer*, 1 Allan 494 (Massachusetts Reports).

The present plaintiffs certainly acted for both parties, and claimed commission from both parties. The defendant, as already stated, swore that he understood that the plaintiffs were acting for him alone, and if he had supposed they were not doing that, he would not have employed them. The vendors have since become insolvent, whether that had anything to do with the subsequent action of the plaintiffs does not not appear. It is questionable on the evidence if a purchase as directed by defendant has ever been effected in respect of the property in question. I think the plaintiffs are not entitled to recover a commission from the defendant under the circumstances of this case. The rule must be made absolute to enter a nonsuit.

Rule absolute to enter a nonsuit.

CORRESPONDENCE.

Division Court Jurisdiction.

To the Editor of THE LAW JOURNAL

SIR,—In the December number of your valuable journal, you have given this sub-

ject a fair and impartial consideration. I am convinced of the correctness of your view of the great danger of "everlastingly tinkering" with legislation affecting the constitution of our Courts.

The replies given to the questions in the Circular (addressed by the Hon. Attorney-General to members of the profession) by the local Law Societies of Peterboro' and Kingston, I do not think are altogether correct, but are, I have no doubt, the opinions of the profession honestly expressed. I dare say if I had the honour of being a member of the profession, I would take the same views as are therein set forth.

That "the officers of the County Courts" are, as a rule, "men of higher training and capacity for the discharge of their official business than those of Division Courts," I deny, at least in this part of the country, and I do not think the statement that "the costs in the Division Court are in proportion to the amounts recovered larger than in the County Court," correct. I fancy the writer must have had some special case in his mind, when penning this sentence: A judgment for $100 can be obtained in a Division Court for $2.65 if undefended, when defendant lives within a mile of the clerk's office; and the total costs when defended, $3.00, of which the defendant (to enter his defence) must pay 35cts. I do not think a judgment can be had in the County Court for any such amount of costs.

I think the Attorney-General would have done well if he had addressed his circular to prominent business men. He makes a great mistake in thinking that the profession alone are interested in the administration of our laws; the public at large, and the commercial community are, in particular, interested in any legislation affecting the Courts, having especial jurisdiction in the collection of debts, and are justly entitled to be heard.

As to the increase of the jurisdiction of these Courts to sums of $200, Division Court clerks would not be benefitted to any great extent, except in a few great centres of business. The clerks in County Divisions would not get many suits in addition by the increase, as there would not be any great number of transactions of that amount to go into suit, even if they did take place. Supposing that one-half the number of County Court suits now entered are for sums of over $100 up to $200, and that they number one hundred per County (which is, I dare say, a very large average), a division of these amongst the Division Courts in the country (which average about seven to a County) would only increase the clerk's number of suits 14 to 15 each, and his emoluments about $40 per annum. In all probability the Judges would think it only right to increase the amount of the bonds given by clerks, and the small advantage of an increase in business would be more than counterbalanced by the costs of increased bonds to the Crown.

Bailiffs might be benefited to some extent, provided the large claims were all allowed to go to execution, and that they always had to sell to make the money. Unless a bailiff make a sale under an execution, he does not become entitled to the commission of 5 per cent.; in this matter he is not in the same position as a Sheriff, with an execution in his hand. My experience is, that large judgments in Division Courts are seldom collected by the bailiff under execution—many are sued solely to get judgment, and to transfer same to County Court, to get execution against land, and in nearly every case where the defendant is good, he manages to settle before execution issues.

I cannot see that the proposed extended jurisdiction of the Courts would greatly benefit the officers generally; but if the Legislature sees fit to extend it, I will accept the law as in duty bound, and carry it out in my Court cheerfully; but I am convinced it will not benefit me to any great extent.

There are certain things in the present Act that strike me as capable of amendment, and perhaps might be worth while for the Hon. Attorney-General to consider. Would it not be well to require a plaintiff, after his execution is returned *nulla bona*. to make and fyle an affidavit, stating that defendant has land or an interest in

land. Many transcripts are now issued to County Courts when there is no use in so doing, it being well known to plaintiff that defendant has no land, or interest in lands, but for the purpose of keeping the judgment ready for use, in case he should become possessed of such at some future day. On fyling such affidavit, the Division Court clerk should be empowered to issue, to the Sheriff direct, an execution against lands, thereby saving a large amount of costs now paid to Attorneys for their fees in the matter. This would be carrying out the principle of keeping this, the "poor man's Court."

A bailiff by the present law is not bound to go outside of his Division to act on an execution; but when he makes a return of *nulla bona*, he must certify that the defendant has no goods or chattels *in the County*. This frequently causes difficulty and delay, and the plaintiff may not be able to get a return in time to make his claim. I would suggest that a bailiff should be compelled, like the Sheriff, to act throughout the County in which his Division is situate.

There are a few changes necessary in the Rules to make them conform to the Act. This is a matter the Board of County Judges can attend to.

I would respectfully suggest that two or three clerks of experience be added to the Board, as an advisory or consulting body—they would be able from experience in working out the Act and Rules, to point out defects which they find to exist.

There is no fee for the clerk for renewing an execution, although it is held by some lawyers that the clerk must on demand of plaintiff, make the renewal.

I would also suggest that the fee allowed to clerks for transcripts is altogether out of proportion to other fees, and is too small. I also think that a fixed sum for everything up to, and entering bailiff's return, to summons, with a specific addition for each additional defendant, would be an improvement; at any rate it would make charges by clerks uniform.

A Division Court Clerk.

[Whilst we do not agree with our correspondent on some points, he puts his case very fairly. As to the duties of a bailiff, he will find, in the second edition of Mr. O'Brien's Division Court Manual, a full discussion on the subject and a review of the authorities affecting it. Eds. L. J.]

REVIEWS.

Precedents of Pleading under the Judicature Acts in the Common Law Divisions; with Notes explanatory of the different Causes of Action and Grounds of Defence, and a Treatise on the Present Rules of Pleading. By John Cunningham, of the Middle Temple, and W. W. Mattinson, of Gray's Inn. London: Stevens & Haynes, Bell Yard, Temple Bar, 1878.

The whole system of pleading has been so revolutionized by the Judicature Act that the whole profession seemed at sea when it became necessary to draft the most simple statement of claim or ground of defence. For some time it would appear that those concerned kept hammering out forms as seemed best in their own eyes, many of which must have been anything but the lucid and concise statements contemplated by the framers of the Judicature Act; but not until Messrs. Cunningham and Mattinson attempted the task was any effort made to supply what must have been felt as a want by numbers. It is not given to every one to write clearly, and conciseness combined with clearness is a gift of the gods. The old works on the subject are now, as the preface says, of comparatively little value, and only a short time before the work appeared it was remarked as strange that some such book had not been written. We are scarcely in a position to judge of the merits of a work which at present is not appropriate to our more antiquated system. Many of the forms, however, would give valuable hints to some of the prolix pleaders who make life a burdon to those on the Bench, and break the hearts of newly articled clerks. There are some valuable notes to the precedents, after the manner of Bullen and Leake, which are as useful here as in England.

Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 42nd VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

William Egerton Perdue.
Elgin Schoff.
James Haverson.
John Cowan.
Ernest Henry Eden Eddis.
Edward Sydney Smith.
John Gilbert Gordon.
Joseph Alfred Wright.
Chester Glass.
Peter Vances Georgen.
James Pearson.
John Bishop.
Frederick William Barrett.
Thomas William Howard.
Daniel Bayarde Dingman.
John Inkerman MacCraken.
James Dowdall.
John Hodgins.
Reginald Gourlay.

And as special cases under 39 Vic. cap. 31 :—

John MacGregor.
William Jex.
Charles McMichael.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

Villeroi Switzer.
Henry Lincoln Rice.

Matriculants.

John Percy Lawless.
Thomas Hadzor Marshall.
Richard Henry Hubbs.
John Robertson Miller.
N. H. Beemer.

Juniors.

Stephen Frederick Washington.
William John Northwood.
John Graham Forgie.
Samuel Thomas Scilly.
Daniel Urquhart.
Levi Thompson.
Denis Joseph Mungovan.
Thomas B. Shorebotham.
Thomas Young Cain.
William Dickinson Farrell McIntosh.
John Dick Hepburn.
David Kirkpatrick J. McKinnon.
David Thorburn Symons.
James Bicknell.
Arthur Wellington Burk.
Lesslie Livingston Jackson.
Charles Creighton Ross.
Arthur Eugene Fitch.
Matthew Elliott Mitchell.
Robert Notman Ball.
George F. Cairns.
James Sidney Garvin.
Gerald Bolster.
Robert Christie.
Noble A. Bartlett.
Arthur Fred. James Spencer.
William Gilbert Macdonald.
Arthur William Johnson.

Articled Clerks.

William Henry Gordon.
Herbert Henry Bolton.
George Holmes Anderson.
Harold Victor Bray.
Edwin Duncan Cameron.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North A and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. / Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junio Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR JUNE.

1. Sun...Whit Sunday.
2. Mon...Supreme Court sits.
6. Fri....Convocation meets.
7. Sat....Easter Term ends.
8. Sun...Trinity Sunday.
9. Mon...County Court Term for York begins.
10. Tues..County Court sittings (ex. York) begin.
14. Sat....County Court Term for York ends.
15. Sun...1st Sunday after Trinity.
17. Tues..Burton and Patterson, J.J., sworn in as Judges of Court of Appeal, 1874.
18. Wed..Battle of Waterloo. Earl Dalhousie, Gov. of Canada, 1820.
20. Fri....Accession of Queen Victoria, 1837.
21. Sat....Thos. Galt sworn in as Judge, C.P., 1869.
22. Sun..2nd Sunday after Trinity.
23. Mon..Hudson Bay Co. Territory transferred to Dominion, 1870.
24. Tues..Convocation meets.
28. Sat....Queen Victoria crowned, 1837.
29. Sun....3rd Sunday after Trinity.

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LAW SOCIETY OF UPPER CANADA .....

Canada Law Journal.

Toronto, June, 1879.

We are glad to see that our enterprising contemporary *The Legal News* has revived under the genial influence of spring, though in a diminished form. The publisher announces that it will be edited with a view to the special needs of the profession in the Province of Quebec.

In England, the present number of Queen's Counsel on the roll is one hundred and eighty-two. Of these about twenty are County Court Judges or in other judicial positions, and about thirty have retired from practice. In Ontario there are seventy-two Queen's Counsel, of whom about six are not in practice.

We have the authority of the Court of Queen's Bench in England for saying, that any person propelling a velocipede, may be legally regarded and accurately spoken of as a gentleman driving his carriage (see *Taylor* v. *Goodwin*, 27 W. R. 489), because a "carriage" is anything that *carries* people, and to "*drive*" is to make to run.

Mr. Justice Johnson gave a decision recently in Quebec, in the case of *Falardeau* v. *Smith*, on the Stamp Act, which will be of interest. It is published in the last number of *The Legal News*. The proper stamps were placed on the note sued on at the time it was made, but by some error or inadvertence were not cancelled by the maker. The plaintiff, the payee, at the trial, applied to be allowed to fix double stamps, so as to validate the note, etc., and the application was granted, and judgment given in his favour.

We expressed the belief last month that the Senate would not follow the vote of the House of Commons as to the Insolvent law. That belief has been verified. Whilst by no means of the opinion that an Insolvent law such as ours is an unmixed good, we think the Senate acted wisely at the present time in applying the "brakes" which the constitution gives them. Unless, however, some much more perfect law is prepared before next Session, the great army of official assignees will be as the locusts in the Red Sea, and their loss will be about as much regretted.

Mrs. Bradwell, of the *Chicago Legal News*, is very cheerful over the successful passage of the Act allowing women to be admitted to the bar of the Supreme Court of the United States. She contests the proposition that it will be necessary to have a nursery attached to the Court-room, and addressing herself to her noble brothers-in-law, promises on behalf of professional womankind that they will be very respectful, and prays in technical language "don't *man-dam-us* before we have had a hearing." Bella Lockwood is the first female name placed on the roll of Attorneys of the Supreme Court.

Sir James Hannen, President of the Divorce Court, in England, who has frequently remarked upon the advance of public morals in the wrong direction, has lately added to this branch of social literature by his judicial utterance in *Marshall* v. *Marshall*, 27 W. R. 400. He there gives his experience as follows:—"I must further observe that so far suits for the restitution of conjugal rights, from being, in truth and in fact, what theoretically they purport to be—proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together—that I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand."

We call the attention of our readers to the full report, contained in this number, in the case of *McPhatter* v. *Blue*.

This was a matter which arose in Chancery Chambers, and related to the lien of solicitors on moneys recovered in a suit through their instrumentality. It shows the liability which a solicitor incurs who deals,—even though *bonâ fide*,—with a fund in Court, without having first duly given notice to the solicitor through whom the fund was recovered. The case was decided in the early part of 1876, but has never been officially reported. As, however, it has been several times referred to, it is hoped that this report may be of some service to practitioners. It has been compiled from the papers used on the application, and revised by some of the counsel who argued the matter.

INTEREST UNDER THE STATUTE.

It is desirable that there should be uniformity of decision in all the courts in regard to the allowance of interest, and after some conflicting opinions this seemed to be attained. Both courts of law and equity start from the same point. Lord Thurlow's language in *Boddam* v. *Riley*, 1 Bro. C. C. 239, explains this: "I take it, nothing but what arises from a contract, agreement or demand of a debt, can give rise to a demand of interest; and this Court in these cases follows a court of law." By statute, the provision in this Province is that the jury may allow interest upon any debt or sum certain, payable by virtue of a written instrument at a certain time, from the time when the claim became payable; and if

payable otherwise than by such a written instrument, then the jury may allow interest from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of such demand: R. S. O. c. 50, sec. 267. It has been decided that a statute similar in terms is applicable when money is directed to be paid by a decree in equity: *MacIntosh* v. *Great Western R. R.* 4 Giff. 683; *Ridley* v. *Sexton*, 19 Gr. 146.

It has been held that no particular formality was required in the demand: it is sufficient if intimation is given in writing to the debtor by the creditor that he claims interest. *Mowatt* v. *Londesborough*, 3 E. & B. 307; 4 ib. 1; and *Geake* v. *Ross*, 32 L. T. N. S. 666. So in *Ridley* v. *Sexton* 19 Gr. 146, and 18 Gr. 580, the majority of the court held that the usual count for interest in a declaration was a sufficient compliance with the demand required by the statute to warrant the allowance of interest from the date of its filing and serving, though in that case the amount of the claim could not be ascertained without taking accounts. The arguments of the dissenting judge in *Ridley* v. *Sexton*, however, appear to be met by the line of reasoning in a recent decision, in which it is broadly laid down that courts of equity are not bound by the statute, so as to be limited to cases therein provided for. In *Spartali* v. *Constantinidi*, 20 W. R. 823, interest was allowed upon profits which the defendant retained beyond the expiration of the period when they should have been paid over, although they were not set apart at that time. But Bacon, V. C., held that as they were capable of easy ascertainment the maxim applied, *id certum est &c.* He then proceeded to act upon "the well-established law of the Court," that money being payable at times susceptible of being easily ascertained, from each of these times the person entitled to receive the money at that time is entitled to interest upon that money from that day. This case was appealed, but pending the appeal was compromised: See 21 W. R. 116.

In *Duncomb* v. *Brighton Co.*, L. R. 10 Q. B. 441, the Court differed in the meaning of the statute regarding the words "payable by virtue of a written instrument at a time certain." Blackburn J. thought that the written contract should expressly state the time of payment, and that it was not enough that the time might be ascertainable therefrom. But the other members of the Court decided that it was enough if a basis of calculation by which it might be ascertained should be established by the written document. This is in accord with the principle adopted by Bacon, V. C., in *Spartali* v. *Constantinidi*.

As opposed to the views of Bacon, V. C., the decision of Hall, V. C., in *Hill* v. *Stafford*, L. R. 18 Eq. 154 is noticeable. He there lays it down that if there is no express stipulation to pay interest in the contract, there should be a demand in writing for payment of a sum certain payable at a time certain. This, however, even the Common Law Judges thought was a too rigid construction of the statute, and they declined to follow it in *Geake* v. *Ross*, already cited.

Interest was disallowed in *Inglis* v. *Worthington Hotel Co.*, 29 C. P. 387, on the ground that there was no written contract, and no demand of interest was proved.

FREDERICK HARRISON ON THE ENGLISH SCHOOL OF JURISPRUDENCE.

Whenever Mr. Frederick Harrison takes up his pen to write on any subject he is sure to deal with it as a deep

thinker, and an accomplished scholar. Certain articles by him under the above title have appeared recently in the *Fortnightly Review*, which, if fragmentary in their character, are nevertheless full of suggestive remarks. The first two, contained in the October and November numbers for last year, were mainly a criticism of certain parts of Austin's writings, and especially of his view of Sovereignty and Law, as considered by the light of Sir Henry Maine's researches. It is not intended to dwell upon them, but it may be worth while to repeat the the author's statement of what he understands by Jurisprudence. "Jurisprudence," says he, "can be placed no higher than a systematic arrangement of rules established by practical convenience; and the attempt to base it on psychological principles or theories of abstract logic, seems arbitrary and quite illusory. Practical convenience is the source of law; and technical convenience is the aim of all classification. The attempt to force metaphysical precision on a body of technical rules would be a mischievous form of pedantry."

It is, however, to the third of these articles, namely, that on the Historical Method, which is contained in the *Fortnightly Review* of January last, to which it is especially desired to call attention. Mr. Harrison begins with some remarks on the *history* of the Historical Method in Law. While some approximation to it may be found in the works of such early writers as Bodin and Grotius, the conception is first found in its fulness in a juvenile production of Leibnitz, viz., the *Nova methodus discendæ docendæque jurisprudentiæ*, published in 1667. Here Leibnitz speaks of the historical method of explanation, and distinguishes between the *external* and the *internal* history of Law; the latter being the history of events which accompanied and affected the actual internal history of law itself. He speaks of an *historia mutationum legis* as one of the things wanted in law.

The next occasion when we meet with the historical method treated in any fulness is in the celebrated 44th chap. of Gibbon's Decline and Fall (1776–1788). For, though, Montesquieu has, in his "Spirit of the Laws" (1748), some allusions to the historical method, and even in some chapters has actually exemplified this method, his book is concerned rather with political and social changes and with the external history of law, than with the internal history. Gibbon's chapter is a most wonderful analysis of the external and internal history of Roman Law. Partly no doubt owing to him an Historical School of Jurists arose in Germany, which is identified with the name of Hugo, author of a celebrated history of Roman Law (1790). Hugo with Haubold and Cramer prepared the field for the historical genius of Savigny, whose work on Possession (1803) marks a distinct revolution in the study of Jurisprudence, and is a complete proof of the value of the historical instrument.

His next great work was the History of Modern Roman Law in which he traced the continuity of the Civil Law from Justinian to the end of the middle ages. Niebuhr's researches in Roman history, and his discovery of the MS. of Gaius, in the Chapter-house of Verona, in 1816, added a new stimulus to the historical treatment of Roman Law. "Gaius" has been described as the best book on Law ever written. But the next great advance in the Historical Method was due to the English School, as represented by Sir H. Maine. This school may be connected by repulsion with Bentham and Austin. Austin does, however, in some parts show traces of the Historical Method. Sir H. Maine shows, with

striking clearness, how familiar legal principles and institutions are traced in widely varying and distant communities.

Mr. Harrison, then, goes on to point out that historical enquiry into law must in nowise be considered as a substantial part of Jurisprudence. Jurisprudence, as has been seen, is concerned with the symmetrical classification of law as it is. Indeed the study of the history of law even has its dangers for the student, who aims at being a practical lawyer. The historical student is concerned with the continuity of law, the practical lawyer with the solidarity of law, that is, with law as it is at any one time. Law as it is in 41 and 42 Vict. The great lesson of Roman Law is the wonderful symmetrical whole which ultimately issued from out of the ancient anomalies. Hence it is best for the student to be first master of the Institutes of Justinian before he dives into the history of prior Roman Law.

Much of the history of Roman Law is almost worthless from the point of view of Jurisprudence,—where useful it is only useful as a method of explanation. Moreover, to study the history of law it must be divided into detached titles; the history of each being studied as a separate subject. The result to the overburdened memory is a series of anachronisms; and many a student well up in the history of Roman Law could in nowise give a connected view of the state of it as a whole at any one time.

Englishmen, says the writer, have great advantages in regard to Jurisprudence.

In the first place they are brought, in their vast empire, into contact with many varying systems of law, especially in India, pregnant with means of historical explanation. This advantage, however, they share with others, for the study of these institutions is open to all men. They have, however, a special advantage of a practical nature. They are forced to accommodate their laws to the wants of the different peoples embraced in their empire. They have to simplify English Law, to clear it from archaisms and anomalies, and to codify it, and place it in a shape fit to be administered by men who are rather political officers than actual lawyers. In doing this—in developing their *jus gentium*—they have a task which the Romans were relieved from. The Romans always had their law in a more or less tabular and codified form. But English jurists have, from the vast materials open to them, to collect and codify. Much has already been done. English Law is approaching the most important epoch in its brilliant career. And just as the Romans at length thought that in their *jus gentium* they had discovered the Law of Nature, so Englishmen may find that in their codes for India and Jamaica, and certain other colonies, they have discovered the road to a more scientific and convenient method of dealing with English Law itself.

F. L.

SELECTIONS.

THE LAW OF EVIDENCE AND THE SCIENTIFIC INVESTIGATION OF HANDWRITING.

The magnitude of the interests involved in the use of written documents can hardly be overestimated, hence the necessity that they should be guarded as far as possible against falsification or fraudulent alteration. A mere enumeration of the many ways in which they enter into the complex relations of modern society would fill volumes, and would require years of study, ranging over the entire history of civilization to record. The preservation of property, character and life itself even, frequently depends upon the integrity of a few words re-

corded with a pen, and hence the various laws devised to prevent the falsifications of writing and the necessity of some sure means of detection in such cases. That such crimes are alarmingly frequent at the present time, and becoming more common every day, cannot be questioned. This I think is more due to the inefficiency of the laws upon the subject, and the unscientific methods of investigation resorted to in many of these cases, than to increased skill on the part of those engaged in such crimes, or to the invention of new methods of working to the same end. Whatever may be the conclusion in this respect, however, it is certain that this class of crimes often escapes detection under the usual methods of investigation as prescribed by the courts, when the evidence is based mainly or as a whole upon that derived from the visible characteristics of the documents themselves. Though no evidence will be deemed necessary in order to prove the fact, as it regards the vast number of crimes of this description which are brought to our knowledge every day, nevertheless I shall give in brief some account of a few of the cases which have been put into my hands for examination, as I shall have occasion to refer to them when coming to the proof of my proposition, that the present rules of evidence in such cases, and the usual methods of investigation recognised by the courts, so far from tending to prevent the occurrence of such crimes, on the contrary, serve to encourage them, by placing obstacles in the way of their detection. And this is eminently the fact as it regards the most skilful workers in this field of art; for where the result depends wholly upon the comparison of handwritings under the most liberal ruling of the courts, surely, the close resemblance of the work of the skilful forger to that of the writing in question, which is sure to deceive the most accomplished expert where the examination is made through the eye *alone*, or, indeed, by the aid of magnifying glasses without other appliances, would necessitate the giving of a positive opinion in his favour. And it is this opinion which is called evidence and which the jury are expected to weigh in these cases. The lawyers themselves recognise the fact of the unreliable character of this class of testimony, in the common saying that they can prove anything by scientific witnesses. This is but declaring that under the rules of the courts they can and do get men to give opinions, or rather guesses, which they present to the jury as facts, and which are allowed to weigh as evidence. As those who make these rules are themselves lawyers, it would seem as if the responsibility of such a perversion of the very idea of justice should rest on their heads alone.

Surely, no scientific man, nor indeed any one who has the smallest claim to such distinction, were he to reflect for one moment, would allow himself to be used in such a manner. His guesses are of no more value than those of the unprofessional witness. If the expert should be, as he is, disgraced by lending his aid in any manner to such practices, what ought to be our opinion in regard to the courts and the lawyers themselves, who call such testimony competent, and allow cases to be proved and decided by this very class of evidence, which they stigmatise as wholly unreliable.

In no other "science" but that of the law, I submit, would such methods of investigation be deemed of the least value. In medicine, which is often charged with being mainly dependent upon guessing, the field of investigation is left entirely open, and its methods are wholly unfettered by iron rules which preclude all true progress. The school of Salerno no longer prescribes the observance of the planets, in order to know the times and seasons for gathering medicines or for administering them. The weapon ointment is no longer used in cases of wounds, for the reason that Paracelsus or Sir Kenelm Digby prescribed it. Nor would the decisions of Sir Tumley Snuffee or Mr. Justice Starleigh have the least influence in fettering the investigations of any modern scientist outside of the field of the law.

I proceed, as necessary to my plan, to give in brief the rules of the courts as regards the examination of written documents; including under the term examination, whatever may be required or allowed to be done in such cases.

"The testimony of experts is receivable in corroboration of positive evidence, to prove that in their opinion the whole of an instrument was written by the same hand, with the same ink, at the same time:" *Fulton* v. *Hood*, 34 Penn. St. 365.

"All evidence of handwriting, except where the witness saw the document written, is in the nature of a comparison, It is the belief which a witness entertains upon comparing the writing in question, with its examplar in his mind derived from some previous knowledge. . . . It is agreed that if the witness has the proper knowledge of the party's handwriting he may declare his belief in regard to the genuineness of the writing in question. He may also be interrogated upon the circumstances upon which he founds his belief. The point upon which learned judges have differed in opinion is upon the source from which this knowledge is derived rather than as to the degree and extent of it:" 1 Greenl. on Evid., § 576.

"There are two methods of acquiring this knowledge. The first is from having seen him write. It is held sufficient for this purpose that the witness has seen him write but once, and that only his name * * The second mode is from having seen letters, bills or other documents purporting to be the handwriting of the party, and having afterwards personally communicated with him respecting them, or acted upon them as his, the party having known and acquiesced in such acts founded upon their supposed genuineness, or by such adoption of them in the ordinary business transactions of life as induces a reasonable presumption of their being his own writings:" 1 Greenl. on Evid., § 577.

"This rule requiring personal knowledge on the part of the witness has been relaxed in two cases. First, where the writings are of such antiquity that living witnesses cannot be had, and yet are not so old as to prove themselves. There the course is to produce other documents either admitted to be genuine or proved to have been respected and treated and acted upon as such by all parties, and to call experts to compare them, and to testify their opinion concerning the genuineness of the instrument in question. Second, where other writings admitted to be genuine are already in the case. Here the comparison may be made by the jury with or without the aid of experts:" 1 Greenl. on Evid., § 578.

Before being admitted to testify as to the genuineness of a controverted signature, from his knowledge of the handwriting of the party, a witness ought beyond all question to have seen the party write or be conversant with his acknowledged signature. The teller of a bank, who as such has paid many cheques purporting to be drawn by a person who has a deposit account with the bank, but has not seen him write, if the testimony shows nothing further, is a competent witness to testify to the handwriting of such a person; but he is not a competent witness to testify to the handwriting of such a person if it appears that some of of the cheques so paid were forged, and that the witness paid alike the forged and the genuine ones:" *Brigham* v. *Peters*, 1 Grey, 139, 145, 146.

A witness who has done business with the maker of the note, and seen him write, but only once since the date of the disputed note, may nevertheless give his opinion in regard to the genuineness of the note, the objection going to the weight and not to the competency of the evidence: *Keith* v. *Lathrop*, 10 Cush. 453.

A third mode of acquiring a knowledge of a person's handwriting is by putting writings acknowledged to be his in the hands of the witness and allowing him to study them and thus become acquainted with the handwriting; and as the result of such study he is in some states, though upon this point there is a conflict, admitted to be competent to testify as to the case in question; that is to examine the document in the case and to give his opinion as to its genuineness. See the authorities, collected in 1 Greenl. Evid., § 579, 581, and notes.

The reasons for refusing to allow such comparisons of handwritings are: 1st. The danger of fraud in the selection of writings offered as specimens for the occasion, or if admitted, their genuineness may be contested and others successively introduced, to the infinite multiplication of collateral issues and the subversion of justice: 1 Greenl. on Evid., § 580.

I next proceed to quote other learned authorities on this part of my subject, some of them opposed to the rules, but all resting upon the false idea, as I conceive it to be, that *opinions* based upon a comparison of handwritings as a question of resemblance or non-resemblance in form alone should have weight as testimony in courts of justice. The more close the likeness the more danger is there, of course, of coming to a false conclusion, and herein lies the danger as I have illustrated more fully in another part of my paper. Again, there is as great difference in the ability of persons to recognise variations in form as there is in the power of distinguishing colour. Many persons are *form*-blind as well as colour-blind, and of this they are, of course, themselves unaware; hence, perhaps, in many cases, the conflicting testimony of witnesses in this respect. Were they required to give reasons for their opinions in such cases, the discrepancy would be self-evident.

This rule would not include such comparison as a means of showing points of difference in handwriting, where such points of difference were made use of by the expert, in connection with other facts which, on account of their relation to each other and to these first also, might help him to come to a conclusion.

"Evidence of handwriting, like all *probable* evidence, admits of every possible degree, from the lowest presumption to the highest moral certainty, and affects the jury accordingly:" 21 Ill. 415, per Breese, J.

It will be seen that this dictum is based upon the idea that such evidence is deducible from a comparison of handwritings, as before explained, which, as I have said before, is less conclusive in those cases where the samples compared most resemble each other; for the expert forger as has been frequently proved, finds but little difficulty in producing *fac similes* of the writings he wishes to imitate; and of course, the so-called expert, in these cases, under the usual methods of examination, can only testify that in his opinion such specimens are genuine. Thus the highest "moral certainty" of the learned judge (and I submit of the courts generally) becomes the strongest physical uncertainty, so that when the court and jury were most affected in this direction, there would be the greater reason to doubt, or at least to make a thorough scientific examination of the writing in question.

"All evidence of handwriting," the judge goes on to say, "except when the witness has seen the disputed document actually written, is in its nature comparison."

"It is only the belief which a witness entertains upon comparing the writing in question with an abstract picture in his mind, derived from some previous knowledge, and he must upon the moment apply that picture or example to the particular writing in question." The exception here laid down in regard to the document not being subject to the same law of recognition, provided the witness saw it written, seems to me not to be quite correct, unless the document had remained in his keeping up to the time of its presentation. He could only recognise it by comparing it with the abstract picture in his mind, painted there at the time it was written, and this same statement would hold good had the document in question been the work of his own hands. It is as necessary to the success of the forger that he be able to bring all parts of his falsified paper in perfect harmony with his model, as that the writing itself should be in the same condition, and this is very often done, and is indeed much less difficult of accomplishment under the rulings of the court than the falsification of the writings itself even.

I have had case after case of the kind where the parties themselves, who had made documents for the express purpose of testing this fact, failed to distinguish between the true and the false; not from the comparison as expressed above of the similated papers with the image remaining in the mind, or recalled by memory alone, but by the actual presence and comparison of the true and the false documents with each other. From these facts alone I think we should be warranted in coming to the conclusion that testimony based upon the resemblance or non-resemblance of handwriting, joined with the evidence deduced from the ex-

ternal appearance of the documents, is, if we go no further, of no kind of value whatever, and that we should oftener get justice in such cases by resorting to the old method of settling doubtful questions by casting lots. Indeed, it seems to me that the present system, like loaded dice, is vastly in favour of the expert forger, if not also of the mere beginner or bungler in the art.

In the continuance of his comments upon the rules of the courts in respect to the comparison of handwritings, Judge Breese, goes on to say, "It has been already stated, that a witness who testifies on the subject of a handwriting, gives at best but the result of a mental comparison made by him of the disputed writing, with that which he has seen, and the impression of which remains in his memory." "What difference could it make if this comparison was carried on in the mind, which the rules of evidence allow, or was actually made in the presence of the court and jury? Is speaking from an impression made on the mind more convincing, more worthy of regard and belief than a present conviction produced by actual comparison?" In Pennsylvania, in *Farmers' Bank* v. *Whitehall*, 10 S. &. R. 112, the court, in discussing the matter, say, "It is more satisfactory to submit a genuine paper as a standard and let the jury compare that with the paper in question, and judge of the similitude, than the evidence continually received of allowing a witness who has seen the party write once, to compare the disputed paper with the feeble impression the transient view of the writing may have made upon his memory."

In a recent English case, 4 Phil. Ev. (Cow. and Hill's notes), part 5, p. 478, it is said "Why is it not as reasonable when a doubtful paper is sought to be made evidence that the opposite party should show a genuine paper and by a comparison of a disputed paper with it that the probability is against its genuineness."

The arguments in favour of the rules of the courts it will be hardly necessary for me to notice. They all of them seem to me of as little value as the first mentioned, which contains in its very proposition its answer, *e. g.* where *genuine* papers are brought forward for comparison, &c. Objection, "The danger of admitting fraudulent ones; of course no paper should be used for the purpose which would not be admitted by all parties to be genuine. No comparison of the kind would be of the least scientific value except under such conditions.

"1st. The testimony of experts may be received to prove that an instrument was written by the same hand, with the same ink, and at the same time." Suppose every latitude should be allowed in such a case, still, under the received methods, if the paper should be skilfully executed, the witness is pretty sure to come to a wrong conclusion. If he guess at the matter, or is governed by his prejudices, which is very apt to be the case, his statements surely ought not to be received as evidence. It is very easy so to prepare ink, and this is constantly done, that it may appear to the eye to be of the age required. Microscopical and chemical tests may be competent to settle the question, but *these* should not be received as evidence, I think, unless the expert is able to show to the court and the jury the actual results of his examination, and also to explain his methods so that they can be fully understood. Surely, in matters involving such important questions, this is not too much to demand of the scientific witness, and he will as surely court such test if he have the least self-respect or regard for the honour of his vocation.

The investigations under this rule have been, heretofore, usually made by the eye, sometimes aided by optical instruments, which are like edge tools in the hands of unpractised persons; sometimes with chemical reagents, which in the present state of the science, can tell nothing in regard to the age of writing, but can tell sometimes as to the kind of ink. The practice has been, and still is, to call on both sides professional experts and others who have seen the party write, or are qualified in either of the ways described, to give an opinion upon the question at issue, and such opinions are to go to the jury as evidence which they are to weigh, say the court, and the value of which they must estimate as one end or the other of the scale shall preponderate.

Is not this the veriest farce and mockery of justice imaginable? and would not drawing lots, as I have suggested, be far better, as it would be far more expeditious and much less costly? If we desire authority for this last method of deciding cases, we have such authority, much older than that of the Romans, which is so often quoted. "The lot causeth contentions to cease and parteth between the mighty." Prov. xviii. 18. It will be seen that I object entirely to those persons being called experts in any case who have not prepared themselves to give scientific testimony (in the full meaning of the word science, *e. g.*, knowledge certain and evident); not only in cases involving the validity of written documents, but wherever the nature of the case is susceptible of this class of evidence.

I use the word opinion in this discussion in its legitimate sense as used in the courts, *e. g.*, "an opinion is an idea or thought about which doubt can reasonably exist, as to which two persons can without absurdity think differently." Out of this system of admitting opinions as testimony in courts of justice, it seems to me, has grown the practice of heaping up such testimony in a certain class of cases, and also the efforts to impose upon the jury by numbers of witnesses, or by some fancied superiority of one witness over another, through the quackery of sounding names or titles, or of *ex cathedra* authority on the part of such witnesses. At a recent trial, a so-called expert was asked what offices he had held which gave him a right to such title. He replied, "I was president of the State Microscopical Society; I am president of the Academy of Sciences," and this statement was pleaded as good reason why his opinion should have great weight in deciding a question of handwriting.

In a recent case involving a large sum of money, in which the writer was engaged, the facts of the inviduality of the handwriting, identity of ink and time, were all required as evidence. Here some ten witnesses, experts and others, were sworn on each side; some actually stating that they had seen the signature of the endorser (which alone gave the note any value), affixed to it by his own hand. This note purported to be nearly six years old. It was written with two different kinds of ink, and the writing, though having a somewhat faded appearance, still was perfectly legible, so that I had no difficulty in making a copy of every letter, and of getting one also by the photographic process. Upon making a micro-chemical examination of the ink, I found it was quite fresh, and moreover, that both kinds used were of such a nature as to grow old rapidly, as seen by the unaided eye, or under direct light, when viewed by aid of the microscope.

Here the experts and other witnesses swore as positively in favour of the sides on which they were employed, as is the usual fact in such cases, and the court remarking that "no court in the world had to do so much guessing as this court," decided in favour of the genuineness of the note. The case was appealed, and a year elapsed before it came to trial. At this time, when the paper was again presented for examination, many letters and several whole words, even, had become totally illegible, thus confirming the conclusions to which I arrived on my first examination, that it could at that time have been but a few months or weeks old. The very astuteness of the skilled forgers in this case contributed to their defeat; they having selected, or more probably made, these inks themselves for the very purpose that they might rapidly grow old in order to appear so when presented for payment.

There is another point of view from which I desire to notice this case. It was carried in the first instance, as said the court, by guessing, or by the balancing of the opinions of experts and others, based upon the comparison of handwritings, under the rulings of the courts. My own testimony was not admissible in this respect, as I had never seen the endorser of the note write. I had in my possession hundreds of documents of his, consisting of cheques, notes, deeds, etc., of which I had made most careful examinations, and yet I was not sufficiently acquainted with his handwriting to give an opinion in the case; while a mere labourer in his employ, who had once seen him sign his name when receipting a bill, was fully competent to testify, that is, to give an opinion in the case.

I should remark that the rule which precludes papers not in the case from being used for the purpose of comparison, is not binding in some of the states nor in the Federal courts.

There are certain methods of examination fairly coming under this head, not, however, contemplated by it or by any other rulings of the courts, which I should deem conclusive. One of these methods I have alluded to in connection with the specimens I have given in the engraving; the other is embodied in the study of the anatomy or skeleton, so to speak, of the handwriting. By the anatomy of the writing, I mean the principles on which the letters are formed. This not unfrequently consists of an undermarking or skeleton which may not appear to the eye, but which constitutes an absolute distinction in style. This can best be illustrated by an actual case.

(To be continued.)

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

RE GEARING.

Insolvent Act of 1875—Married Woman—Trader.

Mrs. Gearing, who was married in 1859, had ever since resided with her husband, who carried on a mercantile business until February, 1876, when he became insolvent. Subsequently at a meeting of the creditors, a sale of his estate was made to Mrs. Gearing, who was not present at the meeting, and took no personal part in its inception or completion, but it was arranged that the purchase should be in her name, and that she should give her promissory notes for the price secured by a mortgage on her separate real estate. Her husband stated that he was really the purchaser, but as he had not obtained his discharge, and had no other security to offer, this arrangement was made, and it appeared that it was understood by every one engaged in the transaction that its object was to enable the husband to continue the business. After the security had been given, the shop was re-opened, the same sign-board remained over the door, and the business appeared to be carried on precisely as before. Purchases of goods were made in her name for which she signed notes, but the orders were always given by her husband, and the correspondence, although conducted in her name, was written and signed by her husband, without any communication with her. After a time he obtained his discharge, and substituted his own name for his wife's in correspondence and on the notes.

Held, that she was not a trader within the meaning of the Insolvent Act of 1875, and a writ of attachment issued against her for a balance due upon her note given before her husband's discharge was set aside.

Delamere, for the appellant.

McMichael, Q.C., for the respondent.

Appeal dismissed.

[May 14.

RE OLIVIER BOUCHER.

Habeas Corpus—Appeal.

A *rule nisi* to show cause why the prisoner should not be discharged and for the issue of a writ of *habeas corpus* was granted by the Chief Justice of the Queen's Bench sitting for the Court out of Term, and subsequently cause was shewn before the Chief Justice sitting in Court and the rule discharged. A formal rule to this effect was drawn up, signed by the Clerk, purporting to be the act of the Court, and headed in the "Queen's Bench before the Honourable Chief Justice Hagarty."

Held, that an appeal to the Court of Appeal did not lie from this judgment under either 29-30 Vic. c. 45, or under R. S. O. c. 38, sec. 18

W. W. Ward for the appellant.

Scott, Q.C., for the respondent.

Appeal dismissed.

C. C. Ontario.] [May 15.

NISBET v. COOK.

Chattel Mortgage—Affidavit of bona fides—Omission of name of Commissioner.

Where the name of the justice of t[he]

peace before whom the affidavit of *bona fides* to a chattel mortgage was sworn was omitted through inadvertence, it was held invalid as against a subsequent execution creditor.

C. H. Ritchie for the appellant.

J. K. Kerr, Q.C., for the respondent.

Appeal dismissed.

CHANCERY.

Chancellor.] [April 23.

Toronto Dairy Co. v. Gowan.

Covenant in restraint of trade—Injunction—Liquidated damages.

The defendant agreed to serve the plaintiffs in their business of milkmen, and in case of any breach by him of the agreement entered into between the parties, and signed by them, that he would forfeit the sum of fifty dollars, to be recovered by the plaintiffs as stipulated damages, and not as a penalty.

Held, That this did not enable the defendant, on payment of the $50, to do the prohibited acts; and in a bill seeking to enforce the agreement the plaintiffs prayed for payment of the amount of the liquidated damages, and for an injunction to restrain the defendant from acting in breach of his agreements.

On the motion for injunction coming on,

Held, that the plaintiffs were at liberty to waive their claim for damages and elect to have relief by injunction.

COMMON PLEAS.

Osler J.] [May 27.

Brillinger v. Isolated Risk &c. Insurance Company.

Insurance—Statutory conditions—Departure—Pleading.

The second count of a declaration, after alleging that it was on a fire insurance policy for $1,000, dated 28th May, 1877, which, by its terms, was said to be subject to certain pretended conditions endorsed on said policy and set out at length in the first count, averred that the policy was a policy entered into and in force in Ontario with respect to property situate therein, and that the said conditions were the only conditions, and were not, nor was any of them in conformity with the Fire Insurance Policy Act, nor variations of such conditions as required by said Act, whereby the conditions so endorsed upon the policy are inoperative and void, and the policy is free from all conditions as against the plaintiff.

The fifth and sixth pleas alleged that the policy was subject to the conditions in the words and figures following, that is to say, setting out conditions with respect to proofs of loss, &c., and averred respectively non-performance by omitting to give notice of loss forthwith, and to deliver a statutory declaration that the loss was just, &c.

To these pleas the plaintiff replied, setting up grounds of excuse for the non-performance of the conditions set out therein.

Held per Osler, J., replication bad as being a departure from the declaration; but that the pleas were also bad, for that the conditions set out therein, being the statutory conditions, and not being endorsed on or in any way appearing in the policy, and not being conditions of the character referred to in *Geraldi* v. *Provincial Ins. Co.*, 29 C. P., they could not be set up as a defence to the action.

J. A. Patterson for the plaintiff.

J. K. Kerr, Q. C., for the defendants.

COMMON LAW CHAMBERS.

McLaren v. McCuaig.

Mr. Dalton.] [May 3.

Similiter—Jury notice—Notice of trial—Chancery sittings.

After issue joined, the plaintiff served notice of trial for the Chancery sittings. Defendant afterwards served a similiter and jury notice. *Held*, that the similiter and jury notice are good, and that the notice of trial must be set aside.

Alan Cassels, for plaintiff.

Aylesworth, for defendant.

Regina v. Campbell.

Hagarty, C. J.] [May 6.

Liquor license—Married woman.

A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O., ch. 181. *Held*, that she was liable to be fined under sec. 83 of the Act, although the sale of the liquor took place in her absence.

Blackstock, for defendant.
Fenton, contra.

CHANCERY CHAMBERS.

Mr. Holmested.] [Feb. 14.
Proudfoot, V.C.] [Mar. 3.

Re Goff.

Statute of Limitations—Possession for infant.

McC., a spinster, made her will in 1862, devising certain land to trustees in trust for G. an infant. McC. then married, and in 1864 was with her husband drowned at sea.

At the time of her death, the property in question was subject to a lease having two years to run. The tenants attorned and paid rent to the trustees under the will, and on the expiring of the lease continued in possession, paying rent first to trustees, and then to G. the infant, after she came of age.

G. in 1879, filed a petition under the Quieting Titles Act, and one, Hunter, appeared in the course of these proceedings, and claimed the land as heir-at-law of McC.

The Referee of Titles *held* that G. had acquired a good possessory title.

On appeal, Proudfoot, V.C., affirmed the Referee's ruling.

Spragge, C.] [April 7.

Sivewright v. Sivewright.

Examination—Presence of parties.

Two defendants were being examined after answer before the Master at Chatham, and the Master, at the request of their solicitor, directed two other defendants who were present on behalf of the plaintiff to withdraw, but they refused. The Master thereupon refused to proceed with the examination.

Spragge, C., *held*, that the Master should have allowed one defendant to be present on behalf of the plaintiff, but by analogy to R. S. O. cap 50, sec. 260, might require such defendant to be first examined himself.

Spragge, C.] [April 16.

Re Kingsland.

Mortgage—Surplus after Sale—Proof of Title by claimant of—Costs.

When mortgagees had a surplus in their hands after a sale under their mortgage, and S. claimed it, but failed to give sufficient proof of his title thereto, and the mortgagees paid the money into court, see *ante*, page 85.

S. then applied to have the surplus paid out to him.

Order made directing surplus to be paid out to S.; after deducting mortgagees' costs of paying in, and of this application.

Proudfoot, V. C.] [May 28.

Williams v. Corby.

Striking out interrogatories as impertinent—Jurisdiction of Referee.

The Referee made an order striking out interrogatories to be administered to a witness under a commission to the State of Ohio for impertinence.

This was appealed from on the ground that the Referee had no power to make the order.

Proudfoot, V.C.—A witness can always protect himself from answering impertinent questions by demurring, and that, I think, is the only way of taking advantage of impertinence.

W. Cassels for appeal.
Hoyles, contra.
Appeal allowed with costs.

CANADA REPORTS.

ONTARIO.

MUNICIPAL ELECTION CASE.

Reg. ex Rel. Ferris v. Iler.

Contract with Corporation—Reeve employed as Road Commissioner.

The defendant was elected Reeve of the Township of Colchester. At such time he was a Road Commissioner for the Township under sec. 454 of the Municipal Act, and entitled to a balance for commission on the money spent by the Township on a certain ditch.

Held, That he was thereby disqualified as a candidate.

[Sandwich, May, 1879—Leggatt, Co. J.

The second ground upon which the relator stated that defendant was not duly or legally elected was that the defendant was not qualified to be elected reeve of the said Township of Colchester, by reason of his having been employed on behalf of the said Township of Colchester, as commissioner for the expenditure of certain moneys in the making of the ditches known as Long Marsh tap ditch, the Holstend ditch and the Boyd tap ditch in said Township of Colchester, and for which the said John C. Iler, the defendant, was to receive and be paid certain percentages, commissions and allowances, whereby a contract was made and constituted between the said John C. Iler and the corporation of the Township of Colchester, which said contract was in force prior to, at the time of and since the said election.

The facts of the case were, as stated by the defendant, that he was appointed, by the corporation of Colchester, a commissioner to superintend the construction of the Long Marsh tap ditch and the Boyd ditch, for which contracts had been made with other parties, and that he was to receive for such service five per cent. commission upon the contract price to be paid by the said township for making the said ditches; that the Long Marsh ditch was to cost about $2,300; that it was not yet finished; and that he had received $50 on account of his commission; that the contract price for the Boyd special tap drain is $642; and that he had received $26 on account of his commission thereon; and that the work was incomplete; that the contract price for the Caya special tap drain was about $300; that it had not been completed; and that he had received $6 on account of it. It is apparent that the defendant had or would have a claim against the corporation when those works should be completed, of about $80 for the balance of his commission thereon, or in other words had an interest to that extent in these contracts with the corporation.

Leggatt, Co. J., the sections which have reference to disqualification of councillors, from the consolidation of the statutes in 1859 down to the present time, and which have been construed by legal decisions, are section 73 of Con. Stat. cap. 54, which enacts, after mentioning certain officials who shall be disqualified, that no tavern-keeper or saloon keeper no person receiving any allowance from the corporation *except as mayor, warden, reeve, deputy-reeve, or township councillor;* and no person having by himself or his partner an interest in any contract with or on behalf of the corporation, shall be qualified to be a member of the council of the corporation. This clause was re-enacted in 1866, by 29-30 Vict., cap. 51, section 73, in which others besides those officials already named were declared ineligible, but the language as to parties having contracts with the corporations was the same. This section also contained a proviso that no person should be held to be disqualified from being elected a member of the council of any municipal corporation by reason of his being a shareholder in any incorporated company having dealings or contracts with the council of such municipal corporation, or by having a lease for twenty-one years or upwards of any property from the corporation. This section, all but the proviso, was repealed by 31 Vict., cap. 30, section 8, and in 1873 re-enacted again with some additions as to parties disqualified in the same terms and language as used by section 74, R. S. O.

In the year 1862, when the clause relating to disqualification was that contained in the Consolidated Statutes of Upper Canada, the language of which with reference to con-

tracts with corporations is identical with that in section 74, R. S. O., but which contained an exception in favour of mayors, reeves, deputy-reeves or councillors receiving allowances from corporations, it was decided by Chief Justice Richards, in the case of *Reg. ex rel. Armour* v. *Coste*, 8 U. C. L. J. 291, that the proof of the mere fact of defendant being a road commissioner to expend moneys raised in and for 1861, did not necessarily imply that he was an officer of the corporation under Con. Stat., U. C., chap. 54, sec. 73, so as to make him ineligible to be elected in 1862, *unless clearly shown that his duties continued.* "By the terms of the by-law," says the judge, "the contracts were to be commenced by the commissioner on or before the 1st September, 1861, and from the nature of the work it is possible that all would be completed within the year. At all events the defendant seems to have received on the 12th December, 1861, all the money he was entitled to in respect of his services under the by-law, so that he would have no contract with or demand against the corporation in respect to such services at the time he was chosen reeve." And in the same year, 1862, by the same learned judge, it was determined in the case of *Reg. ex rel. McMahon* v. *DeLisle*, 8 U. C. L. J. 291, that when defendant had been appointed a commissioner for the expenditure of municipal funds, upon the roads of the municipality in which he resided, and the by-law appointing him fixed a certain commission to be paid to him for his services as such commissioner, and it was shown that some portion of his commission remained unpaid at the time of his election as a member of the municipal council, *he was disqualified as a person having an interest in a contract with the corporation.*

It was contended by the defendant in this case that as the statute and the law then stood it did not then work a disqualification when the allowance is to the person receiving it as reeve, deputy-reeve, &c., and that any compensation awarded to him under the by-law was in such capacity as reeve. The Chief Justice, however, in answer, said, "I am not prepared to give my assent to the proposition advanced in favour of the defendant. In that view, large sums of money might be raised for the purpose of making alleged improvements to be expended by the members of the municipal corporation who would get a percentage on it, and who might vote for the raising of the money to make money out of their commissions on the expenditure. The reason of the rule that excludes any one having a contract with the municipality from being elected a reeve or councillor, usually extends to prevent the councillors from increasing their own emoluments. The exception as to reeves and deputy-reeves from receiving an allowance from the corporation, undoubtedly means the $1.50 per diem which the council may allow them for their attendance in council. "It is not desirable," the Chief Justice continues, "that reeves or councillors should be mixing themselves up with the contracts given out on behalf of the corporations whose interests they are by law expected to look after. It is not desirable that they should be induced to vote for the raising of moneys to be expended under their own supervision in the hope of being able to make some petty percentage out of such expenditure, and thereby indirectly receive a profit out of their office, which the law does not contemplate."

It is apparent that the Chief Justice in these two cases observed a line of distinction between the case of a reeve who was appointed a commissioner to superintend the expenditure of money upon roads where the work was completed and the reeve paid for his services before his term of office had expired, and the case of a reeve acting in the same capacity where the work was not completed and when the commissioner had not been paid in full at the time of his re-election. In the former case, he declares the reeve not disqualified, but in the latter he adjudged him ineligible as a candidate for the office. It is also apparent that the Chief Justice regarded a reeve who filled the office of commissioner, and who was to be paid for his services, as a contractor with the corporation within the meaning of the statute relating to disqualification. It is also clear, I think, that if we are to apply the principle laid down in these two cases

to test the validity of the election of Mr. Iler here, I would have to declare that the defendant was not duly and legally elected, for the reasons assigned by the relator, unless there is some enactment of the legislature since those decisions that would warrant or justify the court in upholding the election. But this is what the defendant contends is the case, and that the statute now no longer works a disqualification where a councillor or reeve is paid for his services as a commissioner, and refers to sec. 454, R. S. O., by which it is declared that nothing in that act shall prevent any member of a corporation from acting as a commissioner, superintendent or overseer, over any road or work undertaken and carried on in part or in whole at the expense of the municipality, and it shall be lawful for said municipality to pay any such member of the corporation acting as such commissioner, superintendent or overseer. By the Municipal Act of 1866, it was expressly declared that no member of a corporation shall be eligible to act as commissioner, superintendent or overseer, over any work undertaken at the expense of the municipality. See section 246. This was, however, repealed the following session, and the provisions of section 454 have been the law since then, or at all events since 1873.

When my attention was first called to this section, and while the case was in progress, there was a strong impression on my mind that defendant's contention was good, and that under that section a reeve or councillor would no longer be disqualified to be re-elected by acting as a commissioner, whether the work was complete or not, or whether he had received his pay in full or not at the time of his election; but, on reflection, and considering the several sections of the acts singly and collectively, I have come to a different conclusion.

Consider for a moment the language of section 454. It does not expressly or by implication repeal the disqualification clause. It leaves that section untouched. It simply declares that nothing in the act shall prevent any member of a corporation from acting as a commissioner, &c., and that it shall be lawful to pay any such member of the corporation acting as such commissioner, &c. It does not go on to declare and enact that a reeve or councillor who undertakes to act as a commissioner, &c., for a fee or reward in the shape of a commission on moneys expended, shall not be disqualified as a candidate for re-election. In the note to this section in Harrison's Manual, the author refers to section 410 as apparently the only section annulled or abrogated by the former clause. When a councillor or reeve seeks re-election, though nominally filling the office till his successor is sworn in, or till after the election, he goes, or should go to the electors as free and untrammelled from contracts with the corporation as he was when first elected. Can this be said of the defendant in this instance? Though the defendant's term of office was virtually ended by lapse of time, he did not or had not divested himself of his undertaking with the corporation to supervise the construction of those ditches, or his office of commissioner for the expenditure of money thereon, which he might have done by resigning, or by repealing that part of the by-law or resolution by which he was appointed.

If the principle contended for by the defendant were admitted, there would be no objection to the reeves and councillors of any municipality at the end of the year devising some grand scheme to dig drains, build bridges or construct roads, making provision for raising money to pay for the work, and appointing themselves commissioners, and then go to the country for re-election with the by-law in their pockets, and use it as a lever to induce influential persons in the municipality to vote and work for them, with the view or under the promise to them of participating in the contracts to be given, giving them an advantage over their opponents in the contest which the law never contemplated that they should possess or acquire.

If the construction put upon section 454 by the defendant was conceded, it would be but the entering of the thin edge of the wedge, which, when driven home, would rend to pieces the fabric built up by the legislature and the courts to protect the in-

terests of the public against venality and corruption in the administration of municipal affairs. It is the duty of courts so to construe statutes as to meet the mischief, to advance the remedy, and not to violate fundamental principles. Another rule of interpretation is that one part of the statute must be so construed by another, that the whole may, if possible, stand. Accordingly, it is a rule that such exposition of the statute is to be favoured as hinders the statute from being evaded.

The contract with the corporation in which the candidate has an interest at the time of the election need not be a contract binding upon the corporation to disqualify him, *a fortiori*, would it therefore be a disqualification where the contract was valid and binding. It would not be either wise or politic to give a wider construction to the section in question here, than the words themselves imply, which is, it is conceived, that it is lawful for the reeve or councillor to act as a commissioner for the expenditure of money, and to receive pay therefor, that is, to receive a fixed sum for his services as such, during the current term of his office, or if he is given a percentage or commission, as the defendant receives in this instance, as the work progresses, then the work must be completed, or he must have received all his commission or pay before his election. If otherwise—if the work is not finished, and the councillor has not been paid in full, but still has a claim already due or accruing due on the uncompleted work, he has such an interest in the corporation at the time of the election, as would disqualify him under the statute.

It might be contended here, perhaps, as in *Reg. ex rel. Davis* v. *Carruthers*, 1 Prac. R. 114, that the amount coming to the defendant, for his commission on these different contracts was ascertained and liquidated, and no possible dispute with reference to defendant's claim against the corporation could arise, and therefore the statute could not apply, but Chief Justice Robinson said in his judgment in that case, "No person can pronounce that a dispute might not arise at any time before the money is actually paid. I could," says he, "suggest several grounds of contention that might possibly be yet advanced, and the intention of the enactment is that in case of any dispute of any kind, the council should be composed of disinterested parties." I am therefore constrained to hold, I think, that the defendant was disqualified, and was not duly or legally elected for the reasons set forth in the latter part of the relator's statement.

Having come to this conclusion, it will not be necessary for me to express any opinion as to the first grounds for voiding the election in the statement of the relator. It is clear that the proceedings of the returning officer on the nomination day were irregular, but whether the irregularities were of such a vital character as to make the subsequent proceedings void, it is not necessary for me now to determine. See note (*a*) to section 112, Harrison's Municipal Manual.

As in *Reg. ex rel. Rollo* v. *Beard*, 3 Prac. R., 357, we may possibly regret the result, from the belief that the defendant was sincere in his conviction that he was not violating any provision of the Municipal Act when he went to the polls for re-election, and to use the very words of Hagarty, J., in that case, "I unwillingly feel compelled to make defendant pay costs, but I think I cannot weaken the effect of this wholesome provision by discouraging parties from bringing a case of disqualification under notice at the peril of having to lose the costs necessarily incurred." Defendant must be unseated with costs.

In the case of *The Queen ex rel. Ferris* v. *Iler*, the defendant must be unseated for the reasons assigned in the second part of the relator's statement. Costs are in the discretion of the court or a judge. As the relator here may have contributed towards placing the defendant in the position he was as to qualification at the time of the election, by failing to give the necessary security promptly when the contract was given to him, and to prosecute and complete the work, which, I assume, might have been done before the end of the year, if the contract had not, in consequence of the relator's neglect, to be re-let, I will award him no costs in this case.

CHANCERY CHAMBERS.

(Reported for the Law Journal *by* F. Lefroy, *Barrister-at-law.)*

McPhatter v. Blue.

Solicitor's lien.

Where D, a solicitor, had recovered certain money for his client B, and another solicitor, acting on the instructions of B, had obtained a cheque for the amount payable to the order of B, and had parted with the control of the said cheque without first giving proper notice to D, —he was held liable to D to the extent of D's lien on the said money so recovered through him.

[The Referee, April 3, 1876.
[Proudfoot, V.C., April 24, 1876.

This was a petition by one Duff who, during the proceedings in this cause in the Master's Office, had acted as solicitor for Donald Blue, one of the respondents in the above suit. The suit was one for administration, and by his report made therein, the Master found that there was payable to Blue, for his costs of suit, $74.62, and also in respect of a claim against the estate, the further sum of $51.81. It appeared from the affidavit of Blue that while the suit was going on, the petitioner said it was necessary for Blue's interests that he should take out letters of administration to the estate of the deceased, and told him to get money from some one for the purpose. Accordingly Blue went to one Wells and told him what the petitioner had said, and Wells lent him $28, which Blue promised he should get back out of the money that would be coming to him (Blue) in the suit. After the Master's report, as appeared from the affidavits of Wells, and of a member of the firm of Messrs G. W. & C., solicitors, Wells went to Messrs G. W. & C. and told them that he had a claim against Blue for money given him to pay his lawyer, which money, he said, Blue was willing to pay him out of his share of the money in Court. He, therefore, asked Messrs G. W. & C. to do what was necessary for the purpose, and they gave him a paper to be signed by Blue, giving them authority to apply for the money, and to pay Wells out of it the money advanced by him to Blue. Having received the paper, duly signed, they on March 10, 1876, obtained a cheque for $52.41, being the sum hereinbefore mentioned with interest, payable to Blue's order, and thereupon they gave it to Wells' son to be endorsed by Blue. They, then, on the same day, wrote to the petitioner, telling him that, in pursuance of a written retainer from Blue, received through the said Wells, they had obtained a cheque for him, and added: "we think it right that you should know this in case you have any claim on the money. The balance after paying Wells will probably be in our hands for a few days."

The above letter was the first intimation the petitioner had of the proceedings taken by Messrs. G. W. & C. for obtaining the money out of court on behalf of Blue. There was at that time due and unpaid to the petitioner his costs for proving said claim, his general costs of suit, and a further sum as costs between solicitor and client, in respect of which he claimed to be entitled to a lien on all moneys payable to Blue by the Master's report. He, therefore, on March 11, telegraphed to G. W. & C. as follows:—

"McPhatter v. Blue.

"Do not pay any money to Donald Blue from this suit. I have a lien for costs on same."

Afterwards on the same day, the petitioner wrote a letter to G. W. & C. telling them that he had a lien on the moneys recovered in this suit for Blue for his costs, both those taxed and also for certain costs as between solicitor and client. He, therefore, told them to let him know the amount they had obtained, and pay it over to him or else to hold it, until he could obtain an order for payment over to him.

It appeared, however, from the affidavit of the said member of the firm of G. W. & C., that they did not receive this last mentioned letter until March 13th. They, however, duly received the petitioner's telegram on March 11th, but they had by that time given up the cheque to Wells' son. In fact, as set out in the said affidavit, they deemed notifying the petitioner at all was an act of courtesy, and not necessary in law; and they understood from the telegram, that all the petitioner objected to was their paying

any money to Blue, and that he did not object to Wells' being paid.

Accordingly, on the same day, March 11, they wrote to the petitioner as follows :— "We have your telegram of this morning. The cheque we got was only for Blue's share, not his costs. We have given the cheque to Wells to be endorsed by Blue, and returned to us after paying Wells out of it. The balance we will hold as long as we can to enable you and Blue to agree on a settlement."

Blue indeed swore in his affidavit that when he put this case into the hands of the petitioner and his partner, now deceased, he made an express bargain with the said partner of Mr. Duff, that he would not charge anything for attending to his interests in the suit beyond such costs as he could tax, and recover out of the lands when sold, and that he was not to pay him anything personally.

The petitioner, however, now prayed that it might be referred to the Master to tax his costs against Blue, in addition to those already taxed herein, and that Blue and G. W. & C. might be ordered to pay to him the amount of the said costs to the extent of $52.41, and his costs of this application.

Boyd, Q.C., for petitioner. G. W. & C. cannot hold the money without answering the lien of the petitioner. The said lien was a prior lien to that of Wells, and by withdrawing the said sum from Court without previous notice to the petitioner, G. W. & C. rendered themselves liable to pay the petitioner the amount due to him to the extent of $52.41. There had been no order to change the solicitors, therefore they are answerable for the consequences : *Haymes* v. *Cooper*, 33 L. J. N. S., Chy. 488. They don't say when they paid the money to Wells, therefore it must be assumed that they paid after having received notice by the petitioner's telegram.

Hoyles, contra: The petitioner's telegram only requires G. W. & C. not to pay to Blue. Blue swears that there was an express agreement between him and the petitioner that there should be no costs between solicitor and client: *Geddes* v. *Wilson*, 2 Chy. Ch. 447. The petitioner should have obtained a stop order. As soon as the money was paid out the lien ceased. Notice was necessary to render G. W. & C. liable. He also cited *Read* v. *Dupper*, 6 Term Rep. 361; *Brunsdon* v. *Allard*, 28 L. J. Q. B. 306.

Boyd, Q.C., in reply : G. W. & C. could not have been misled by the telegram. The previous letter from G. W. & C. to the petitioner did not state that Wells had any claim. The amount of costs due to the petitioner as between solicitor and client, must be taxed by the master, as the affidavits are contradictory. The solicitors G. W. & C. were affected with all the equities even without notice.

The Referee refused the petition with costs.

On appeal this decision was reversed.

W. Cassells, for appellant.

Hoyles, contra.

Proudfoot, V.C.—I cannot ascertain from the papers what it was that was done in *Muntz* v. *Brown*.* At all events it was distinguishable from this because the solicitors entitled to the lien assented to what was done. Here there was no assent.

I think as against Blue the order asked is quite clear : and as to the solicitors who got the cheque from court and suffered a portion to be paid away, I also think the order must go. No case has been found in our Court. Those in England are in favour of the order asked, *Haymes* v. *Cooper*, 33 Beav. 431. As to notice I think it clear as a matter of fact they had notice, but as was said by the M. R. in the last case—"Where a man knows there is a fund in Court he knows also that it is subject to the solicitor's lien for his costs in recovering it and that he is entitled to be paid in the first instance;" and there does not seem to me to be anything in the practice of our Courts to sanction a variance from the English practice.

It is quite clear that G. W. & C. could not have been misled by the telegram of Duff, it did not reach them till they had given up the cheque.

Order to go as prayed.

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*The judgment does not show whether this case of *Muntz* v. *Brown* has ever been reported. I have been unable to ascertain.—Rep.

IN THE COUNTY COURT OF THE COUNTY OF ONTARIO.

Lee v. Beall.

Practice—Service of a writ against a British subject residing without the jurisdiction—Not irregular when served within the jurisdiction.

[Whitby, March 26—Dartnell, J. J.

The papers filed showed that a writ, for service out of the jurisdiction, was taken out on the 27th of February, 1879; that the defendant was a permanent resident of the City of Montreal, but being temporarily in the Village of Port Perry, in the County of Ontario, was served with a copy on the 5th day of March instant. A summons was taken out to set aside this service as being irregular.

Dartnell, J. J. There does not seem to be any express decision upon this point of practice; the cases cited of *Hasketh* v. *Flemming*, 1 Jur. N. S. 475; *Green* v. *Braddyll*, 1 H. & N. 69; and *Medcalf* v. *Davis*, 6 Pr. Reports, 275, not being in point. A careful consideration of the clause of the C. L. P. Act bearing upon the subject leads me to believe that the intention of the Act was that judgment could not be entered against a British subject, residing without the jurisdiction, unless he had been served with a writ in the prescribed form. If this defendant had been served with the ordinary form of summons for service within the jurisdiction, no doubt it could have been set aside, on its being shown his residence was beyond it. It is not usual for Courts to set aside process or proceedings, where there has been a substantial compliance with the governing statute or rule. I think here that there has been such compliance. The defendant has received all the notice required, and what he in effect asks is, that the plaintiff, if he fail in his action, or he himself if the judgment be against him, should be saddled with the additional cost of service in Montreal. It is urged that the statutory endorsement that the "writ is for service out of Ontario," implies that such service cannot be made within it; but I think the reasonable meaning of this is, that it is for "service on a party *living* out of Ontario." It is urged that I could amend under sec. 38; but there is really nothing to amend. There is "no mistake or inadvertance," and besides this section is an enabling enactment, and the application must be made by the plaintiff, and cannot be made on a motion by the defendant.

As the point is a new one, and as the summons was moved without costs, I discharge it without costs. The defendant will have four days further time to appear.*

LAW STUDENTS' DEPARTMENT.

Examination Papers. Mich. Term, 1878.

First Intermediate.

Smith's Common Law, and Con. Stat. chaps. 42 & 44.

1. In how far will assault and battery be justified on the ground of its being in defence of a house?

2. What is the meaning of the term "*Merger*" in relation to contracts? Illustrate your answer.

3. "Estates for life are usually given *without impeachment of waste.*" Explain the meaning of the italicised words in this quotation, and state in general terms the rights of the grantee of such an estate.

4. A person owns a piece of vacant land adjoining a dwelling house, also owned by him, having a window overlooking the vacant land. He sells the vacant land to A and the house to B. Will it make any difference in the right to access of light to the house whether the conveyance to A is made before that to B; and, if so, what difference will it make?

5. What is the effect of the words "*lost or not lost*" in a Marine Policy of Insurance?

6. Explain fully the effect of the words "and not *otherwise or elsewhere*" following the name of the Bank at which a promissory note is made possible.

7. What is the effect of one of two joint contractors making a payment on account, after the remedy on the contract is barred by the Statute of Limitations?

[* The converse of this case was decided in Chambers by Morrison, J. on appeal from Mr. Dalton, in *Snow* v *Cole*, 7 Prac. R. 168. Ed. L. J.]

Williams on Real Property.

1. What were the means by which the feudal system was introduced into England? Give, as far as you can, the various opinions upon the subject and the reasons for them.

2. Explain the origin or significance of the terms real and personal property, and the reason for classing estates for years under the latter division of property.

3. What was the nature of the tenure acquired by a *conditional gift* under the feudal system?

5. State shortly the effect of the statutes of Elizabeth as to voluntary conveyances.

6. What were equitable assets? In what way did their distribution among creditors differ from the distribution of legal assets, and what was the ground of such distinction?

6. In what manner at the present day are assets of a deceased person applied in payment of his debts where the assets are insufficient to discharge all the liabilities?

7. Distinguish between *heir apparent* and *heir presumptive*.

Second Intermediate.

Leith's Blackstone—Greenwood on Conveyancing.

1. Enumerate and distinguish between the various kinds of advowsons.

2. What do you understand by common of estovers?

3. By what different modes may *ways* arise? Give an instance of an implied grant of a way.

4. What do you understand by free and common socage?

5. What effect (if any) has a divorce upon a right of dower?

6. Has a husband any, and if so what, rights as tenant by curtesy in equity which would be denied him in a Court of law?

7. What do you understand by tracing descent *per capita* and *per stirpes*? Give examples.

Certificate of Fitness.

Taylor's Equity Jurisprudence — Pleading and Practice.

1. Discuss the principles upon which the Court acts upon a bill to set aside a compromise of doubtful rights.

2. In what cases will the Court rectify mistakes in wills? Illustrate your answer.

3. What is the extent of the obligation which rests upon a creditor to make disclosures or give information to an intending surety? Answer fully.

4. In a will there is a bequest of personalty and a devise of realty, with certain conditions annexed. Give the rules as to the vesting and divesting of the gifts according as the conditions may be good or bad, or may be observed or disregarded.

5. In what proportions must a tenant for life and remainderman contribute to the payment of an encumbrance upon the estate?

6. What law governs the administration of assets of a foreigner, and what the determination as to whether debts are primarily chargeable upon realty or personalty?

7. When can a suit for the recovery of a legacy be commenced at Law, and when in Equity? What is the reason for the distinction?

8. What is the full extent of the right of a plaintiff in a suit as to obtaining orders to amend his bill, and how must these various orders be applied for?

9. A is indebted to B and B to C. B, by his bill of exchange, directs A to pay the amount of his indebtedness to C. A refuses to accept the draft when presented by C. Has C any remedy against A? Give your reasons.

10. What cases are set down to be heard by way of motion for decree? How are they so set down, and what material can be used upon such hearing?

Snell's Equity and 29 Vic. Cap. 28.

1. Illustrate the maxim that "*Equality is Equity.*"

2. Define executed and executory trusts.

3. In favour of what classes of persons will a presumption of advancement be raised, in case of purchase being made in the name of the person not the purchaser? Explain your answer fully.

4. Define and illustrate the equitable doctrine of performance.

5. Give the rules given by Snell as to the distinction between a penalty and liquidated damages.

6. What remedy has a surety in case the creditor delay proceedings against the principal debtor? Can he compel the creditor to proceed?

7. What is the effect on the remedy of a person who claims against the estate of a deceased person, of the executor giving notice in writing to such creditor that the executor rejects or disputes his claim?

Smith on Contracts—The Statute Law.

1. A grantor delivers an executed deed to the grantee therein named, saying at the time in express terms that he intends the delivery to be conditional on the performance of some condition. What is the legal effect of this? What is an escrow? Explain fully.

2. What is the test of the admissibility of oral evidence of custom for the purpose of varying or explaining a written contract?

3. What is the marked distinction between bills of exchange and promissory notes and other simple contracts? Explain and illustrate your answer.

4. What is the legal effect of a deed providing for the support of a wife on the occasion of an immediate separation? Give reasons for your answer.

5. What effect will the reconciliation and living together of man and wife after execution of a lawful deed of separation have on the deed? Explain your answer fully.

6. In how far, if at all, is the general rule, that, *where money has been paid upon a consideration which totally fails, an action will lie to recover it back again*, true where the contract is an illegal one?

7. A and B are co-sureties to C for the debt of D to C. C has obtained judgment and execution against D, but is unable to realize, and is threatening proceedings against A and B. State shortly the rights and remedies of the various parties mentioned, with special reference to any statutory enactment affecting them.

8. Give the principal rules for the construction of contracts referred to by Mr. Smith.

9. A wishes to purchase certain goods from B, which are to remain in the possession of B after the sale. What formalities would you advise them to comply with in order to secure their intentions being effectually carried out? Give reasons for your answer.

10. What is a registered lien under the Mechanics' Lien Act, and wherein does it differ from an unregistered lien?

BARSTOW SCHOLARSHIP.

Constitutional Law and Legal History.

1. Trace the connection between the compurgators of Saxon times and the jury under the early Plantagenets, marking the steps of the development of the institution of the jury, and showing how their position was understood in the times of Mary I. and of Charles II. respectively.

2. Describe the machinery by which justice was administered under Henry II., and specify the principal modifications which it had undergone by the close of the reign of Edward III.

3. Explain the purport of the Statute of Fines. To what motives has this enactment been attributed, and what are Hallam's conclusions as to the tenability of this theory? For what purposes were they principally used, and when were they abolished? What are the modern substitutes for them?

4. Sketch the history of the law determining the duration of Parliament and the frequency of its summons, and point out the existing securities for its annual convocation.

5. What is understood by the privilege of freedom from arrest enjoyed by Members of Parliament? Shortly sketch the history of this privilege, mentioning any notorious cases in which it has been violated. Why has this privilege lost much of its practical importance, and what does it at the present day practically amount to?

6. Lord Shaftesbury, in 29 Car. II., having been committed to prison, sued his writ of Habeas Corpus, the return to which stated that he was imprisoned "by order of the Lords Spiritual and Temporal during the King's pleasure, and during the pleasure of this House, for certain high contempts against this House." Could any objections have been taken to the validity of this return?

7. How does Lord Mansfield define "Liberty of the Press"? Give a short history of the subject, showing how it has been from time to time repressed, and stating the purport (according to Scroggs) of the opinions of the judges upon this subject. What is at present deemed to be the limit of lawful publication of comments on the management of public affairs or on the conduct of public men?

8. What points were settled in the reign of Charles II. as to the judicial powers of the House of Lords? Briefly state the cases in which the questions on this subject were raised.

9. What was Sir Henry Vane's defence on his indictment for treason, and how was it dealt with by the Court? What is Hallam's principal censure upon the conviction of Vane? How far is it conclusive? What points upon the law of treason or upon the procedure for that crime were raised in the several cases of Sidney, Messenger and Armstrong?

10. What arguments were there for and against the clause in the Act of Settlement excluding placemen from the House of Com-

mons? When was the clause repealed, and what provisions were subsequently made to mitigate the evils arising from the presence of pensioners and placemen in the House?

Jurisprudence, including International Law, public and private.

1. "Omne autem jus quo utimur vel ad personas pertinent vel ad res vel ad actiones." How far is this a scientific or convenient distribution of the field of law?

2. Explain the juristic character of marriage, discussing the various views which have been maintained upon the subject.

3. What is "public law," and what is its relation to "the law of nations" and to the so-called "private international law?"

4. What rules of maritime international law which were generally accepted a century ago have now ceased to be so accepted? Through what historical events and by what diplomatic acts has the change in each case been brought about?

5. By what law is the validity of the transfer of property of various kinds to be decided? How far are the authorities agreed upon this point?

OBITUARY NOTICE.

Nesbitt Kirchoffer, Q. C.

This gentleman died at his residence, in Port Hope, on 26th April last. At a meeting of the Bar in that locality—

Mr. T. M. Benson, seconded by Mr. R. H. Holland, moved—"That we desire to express the regret with which we have received the intelligence of the death, at an early hour this morning, of Mr. Nesbitt Kirchhoffer, Q.C., who was for many years a Bencher of the Law Society of Upper Canada. For a long time he had held the position of senior member of the profession in this County, and he enjoyed the respect of the whole Bar of this District. He will long be remembered as a lawyer of ability and integrity, and as one who, in a profession singularly exposed to misrepresentation, gained and held throughout a long professional career the confidence and esteem of the community in which he lived. It is resolved that we will attend his funeral in a body, and that the members of the profession in Cobourg (the County Town) be invited to join us in paying this last tribute of respect to one whose decease is a loss to the bar of these Counties. We desire also to express our sympathy with his bereaved widow, and to offer her our respectful condolence; and we instruct our Secretary to communicate to her the contents of this resolution." Carried.

At a joint meeting of the Bars of Port Hope and Cobourg, held on the afternoon of Monday, April 28, the members of the Cobourg Bar expressed their concurrence in the above resolution, and desired to join therein.

CORRESPONDENCE.

Mechanic's Lien.

To the Editor of The Law Journal.

Sir,—From the note of the case of *Hynes* v. *Smith*, which appeared in your last issue, it appeared that the plaintiff had commenced work, in respect of which he claimed a mechanic's lien before 31st Dec. 1877. Subsequently the owner made two mortgages, one of which was registered 31st May, 1878, and the other on the 8th June, 1878. On the 18th June, 1878, plaintiff registered his lien, and on 28th August following filed his bill. On this state of facts it was held that the mortgagees were prior to the plaintiff. The reasons of this decision have not yet been published, and it seems at first sight to be difficult to reconcile it with the Act.

The interpretation clause defines that the true "owner" is to include all persons claiming under him, at whose request the work is done, whose rights are acquired after the work is *commenced*. Section 3 gives the lien-holder a lien "*by virtue of being so employed*" against the estate and interest of the owner, not by virtue of registration, it is to be observed. Section 26 provides that the Registry Act shall not apply to any lien arising under the provisions of the Act, except as therein otherwise provided, and there is no provision, I think,

affecting the present case, assuming the lien to have been registered within thirty days of the completion of the work, as provided by section 20.

It is possible the provisions of section 26 may have been lost sight of.

One would think, apart from the Registry Act, there could be no question that if the lien attaches upon the estate and interest of all who acquire an interest in the land after the *commencement* of the work, that, on the facts stated in the note, the mortgagees were clearly subsequent to the plaintiff.

READER.

FLOTSAM AND JETSAM.

On 22nd of Jan. last, the University of Dublin conferred the degree of LL.D., *honoris causâ*, upon Lord Dufferin. The Rev. Dr. Hart, Vice-Provost and Pro-Vice-Chancellor, presided in the absence of the Chancellor and Vice-Chancellor of the University. After the Earl of Rosse had been first introduced and signed the roll, Lord Dufferin next came forward, and Dr. Webb, Regius Professor of Law, introduced him in an eloquent little Latin speech. The following is a humble attempt to do justice to the original:—

"Most honourable Mr. Pro-Vice-Chancellor and gentlemen of this University, I present to you Frederick Temple, Earl Dufferin, a man by birth and rank illustrious, in culture, eloquence and administrative skill absolutely unrivalled. In him, born as he was of more than monarch ancestors—for Sheridan's grandson, I hold to be the offspring of a more than regal line, the nation foresaw a future greatness, and greeted him while yet a stripling. In his early manhood, obeying the dictates of his versatile genius, he scorned patrician luxury, and 'Far to the chilly North his flight pursued,' and by the cunning of his story breathed on those icy regions, his own spirit's warmth (mentis suæ calorem inspiravit). Nor was it long before the nodding heights of Lebanon knew in him an ambassador, arbiter, and peace-maker, Lebanon which had looked down upon so many and so mighty conqnerors. A pinnacle was added to his renown by his illustrious, his brilliant administration of Canada. Factions pacified, races united in amity, provinces at variance amongst themselves brought to unity, the Dominion ultimately established—these are his achievements, these form his fame, these his civic crown. He was not the man to cast off loyal colonies of kindred blood, most warmly attached to us (colonias consanguineas fideles et nostri amantissimas projicere). He was not the man to weaken and hold of no account the British Empire, founded by a valour truly Roman. His was a genius, as all men agreed, capable of government, a genius whose capacities his government made known as never they were known before. How great thy debt to Ireland, O Anglia, these names alone testify—Wellesley, Wellington, Monck, Lawrence, Mayo, Dufferin, By such heroic stock are empires founded and maintained,—

'Sic fortis Etruria crevit.'

Then rose Britannia, echoing name. May it through eternal ages echo still."

Lord Dufferin, having affixed his signature to the roll, was greeted with warm applause, and shook hands with the presiding functionaries. There were repeated calls for a speech; he did not however, respond to them.

In the Court of Appeal at Lincoln's Inn, a case involving the doctrine of a wife's equity to a settlement was heard the other day before Lords Justices James, Bramwell, and Brett. In the course of the argument Lord Justice Bramwell said: "There's no such thing as an equity since the Judicature Acts came into operation—is there?" Counsel ventured to suggest that it was rather law than equity which had been abolished. "It's like shot silk," observed Lord Justice James, "both colours are there, and it depends upon the light in which you look at it which colour you see."—*Mayfair.*

In the recent case of *Nunn* v. *Hemming*, brought by an ex-lunatic, against the keeper of the lunatic asylum in which he had been confined, for assault, it seems to have been assumed both by judge and jury that a man subject to hallucinations on one point is necessarily untrustworthy as a witness, and that his evidence on all other subjects must therefore be discredited. There is a well-known story, illustrative of the contrary proposition, told of Burke, who, in collecting information for a speech that he was about to deliver in the House on an Indian question, was referred to an ex-official, then the inmate of a lunatic asylum. Burke had an interview with the lunatic, who proved to be a man of excellent information, and fully competent to advise on the subject on which he consulted him. On leaving the asylum Burke expressed his indignation to the keeper of the asylum, and intimated his intention of bringing the matter before Parliament. "Before you do that, sir," replied the keeper, "go back and ask him what he had for breakfast this morning." Burke did as

Flotsam and Jetsam.

he was requested, when the lunatic at once burst into indignant invective against the authorities, and replied, "Hobnails, sir; is it not disgraceful? Hobnails; nothing else." Burke was satisfied; but I never heard that he rejected the poor man's testimony on the Indian question—*World.*

Lord Justice Cotton has taken to "criminal business" as a "duck does to water," as the saying is. His robes, made evidently for the occasion of the present assizes, are of the brightest crimson, his ermine of the whitest. His "Archbold's Criminal Pleading and Evidence," his "Russell on Crimes," and his "Stephen on Evidence" are each, notwithstanding certain symptoms of hasty perusal, still radiant in the newest covers. But his *black cap!*—that is, indeed, a sight worth a journey to Maidstone. Unlike the plain square of black cloth ordinarily used, it is daintily turned up at the corners and secured apparently by pins, and presents somewhat the appearance of an ecclesiastical *birreta*. The shape and sit of this article of judicial attire have evidently been the subject of much thought, both on the part of his lordship and his *body-clerk*. Most judges when they have to pronounce sentence of death, take the black cap from a drawer in the desk before them, or from their pocket, and place it on their heads. Not so Lord Justice Cotton. As the time approaches for sentence to be delivered, and whilst he is still addressing the prisoner, his body-clerk slips out of his seat, and, going behind the judicial chair, arranges the cap, pinned up as aforesaid, daintily on his lordship's wig, and lightly and noiselessly retires until sentence is passed, when my lord majestically retires to his private room, possibly with a view to study the effect at leisure.—*World.*

In the death of Mr. Isaac Butt, which occurred near Dublin, on the 5th inst., the Irish Bar has lost its most brilliant member. Mr. Butt was born in 1813, and was educated at Raphoe School, and at Trinity College, Dublin, where he graduated B. A. (in classical and mathematical honours) in 1835, and LL.D. in 1840. He was called to the bar in Ireland in November, 1838, when he joined the Munster Circuit. He was frequently engaged as counsel for the Corporation of Dublin, and in 1840 he was heard at the bar of the House of Lords in opposition to the Irish Corporation Reform Bill. Mr. Butt became a Queen's Counsel in 1844, and was called to the bar at the Inner Temple in Michaelmas Term, 1859. He rapidly rose into leading business at Dublin, and held briefs in many important cases, including *Smith O'Brien's case*, the Fenian prosecutions, and the recent probate suit of *Bagot* v. *Bagot*; and was also often engaged in Irish appeals to the House of Lords. Mr. Butt entered the House of Commons in May, 1852, as M.P. for Harwich in the Conservative interest, and at the general election in the ensuing July, he was returned for Youghall. For several years he acted with the Conservative party, but at a later day he gave an independant support to the government of Lord Palmerston. At the general election of 1865 he lost his seat by a few votes, and for the next few years confined himself to his professional duties: but in 1871 he was returned without opposition for the City of Limerick, and was thereupon selected as leader of the new Home Rule party, which position he occupied until his death. As an advocate Mr. Butt belonged to the class of which Scarlett and Follett are prominent examples among English barristers, having no very profound knowledge of the law, but readiness in acquiring whatever is necessary for the case in hand and facility in laying facts and arguments before courts and juries.

Judge Dillon has resigned the judgeship of the Eighth Federal Circuit, with the intention, it is rumoured, of accepting a professorship in the Law School of Columbia College. Although but yet in the prime of life, Judge Dillon has had a large experience as a judge, having been Chief Justice of the Supreme Court of Iowa for some time prior to his appointment to the Federal Judgeship, and he has won the reputation of being one of the ablest judges in the country. Mr. Secretary McCrary has been urged as successor to Judge Dillon.

A Female Attorney in Difficulties.—Mrs. Bella Lockwood has succeeded in obtaining admission to the Washington bar, but finds this is not a passport to other legal fraternities. A short time ago she entered the Court of Judge Magruder, of the Seventh Judicial Circuit of Maryland, and there attempted to act as an attorney. But the Court would not permit her to do so, and lectured her after this manner: "God," said the Judge, "has set a bound for woman. She was created after and is part of man. The sexes are like the sun and moon moving in their different orbits. The greatest seas have bounds, and the

eternal hills and rocks that are above them cannot be removed." When the Court finally adjourned Mrs. Lockwood attempted to address the ladies and gentlemen who were present, but a bailiff prevented her from making any speech in the Court room.

A LAY OF THE LAW.

Air.—"When I was young I had no sense."

Though I was old I had no sense,
Nor cared a fig for the great expense;
So I went to law, and I'm vexed to say
That my luck was bad, and I won the day.

For if I had lost I did not intend
On another trial more cash to spend;
But as I had won, what could I do,
When the loser appeal'd, but fight it through?

And so the matter was tried again,
And I my triumph did not maintain,
For whereas one Judge had said white was white,
Two ruled 'twas a different colour quite.

This made me angry—I don't conceal—
And I resolved to once more appeal;
And three more Judges in proud array
Decided that white was bluish gray.

Now since the court below had said
That the white in point was a rusty red,
The latest judgment was felt to be
On the whole a verdict in favour of me.

Upon which at once my obstinate foe
Declared to the House of Lords he'd go;
And their Lordships ruled by three to two
That my white was really a Prussian blue.

So I lost my case, since there was, alack!
No higher tribunal to say 'twas black;
And a thousand guineas I had to pay
Because at the start I won the day.

But though this sum of money I've paid
The law to me no return has made,
Except to tell me in accents dread
That white is gray, and blue, and red!

Now, if 'tis truly a Prussian blue,
Why didn't the first Judge say so too?
Or why couldn't I, expense to save,
At once the highest opinion crave?

For law is law, as it seems to me,
And all of it ought first-class to be,
Since suitors must be perforce be-fooled,
When courts but exist to be over-ruled.

Christmas number of Truth, 1878.

The newspaper reporters of this day are certainly enterprising. One of them has divulged the secrets of the interior of Africa, and another, pretending to be insane, had himself confined in a lunatic asylum, and exposed the abuses to which the real lunatics were there subjected. And now comes a *World* reporter, who not being married, found an accommodating New York city attorney, who for $35, and upon the candid statement that the applicant had no cause for divorce, procured him a divorce in a Wisconsin court! It seems to have been a case of "diamond cut diamond." The reporter imposed on the attorney, Mr. Munro Adams—who by the way is not an attorney at all—by pretending to be married to a Canada wife of "incompatible temper." A summons and complaint in blank as to the defendant, the complaint apparently but not really verified, were drawn up, and the injured husband sent them to a friend in Canada, who was in the secret, with a letter from the attorney stating that the wife's admission of service would assist the husband in a suit against a party whose name was not definitely ascertained. In due time the admission was returned apparently signed by the wife, from whom the pseudo husband also apparently obtained some letters acknowledging her faults, etc., to facilitate the matter. In a few weeks, without any thing more having been done to the knowledge of the reporter, he was furnished by the attorney with a copy of a decree of divorce of the circuit court of Walworth county, Wisconsin, purporting to have been rendered after a hearing of proofs, etc., and purporting to be signed by John T. Wentworth, circuit judge, and certified and sealed by the clerk, all very formal and red tapes. We understand that the reporter is now on his way west to investigate the genuineness of the document. This story occupies four columns of the *World*, and is rare reading. The probability is that the document in question is an impudent forgery, and that the transaction furnishes no criterion for judgment respecting the bogus divorce business, but still it is significant. At all events this enterprising reporter seems to have the ability to do even more effectual things in the exposure of iniquities. If we ever have need of acute services in this line, we shall address a line to Mr. A. Oakey Hall, of the *World*, asking him in De Quincey's words, "*Ubi ille est reporter!*"

Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 42ND VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

William Egerton Perdue.
Elgin Schoff.
James Haverson.
John Cowan.
Ernest Henry Eden Eddis.
Edward Sydney Smith.
John Gilbert Gordon.
Joseph Alfred Wright.
Chester Glass.
Peter Vances Georgen.
James Pearson.
John Bishop.
Frederick William Barrett.
Thomas William Howard.
Daniel Bayarde Dingman.
John Inkerman MacCraken.
James Dowdall.
John Hodgins.
Reginald Gourlay.

And as special cases under 39 Vic. cap. 31 :—

John MacGregor.
William Jex.
Charles McMichael.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

Villeroi Switzer.
Henry Lincoln Rice.

Matriculants.

John Percy Lawless.
Thomas Hadzor Marshall.
Richard Henry Hubbs.
John Robertson Miller.
N. H. Beemer.

Juniors.

Stephen Frederick Washington.
William John Northwood.
John Graham Forgie.
Samuel Thomas Scilly.
Daniel Urquhart.
Levi Thompson.
Denis Joseph Mungovan.
Thomas B. Shoebotham.
Thomas Young Cain.
William Dickinson Farrell McIntosh.
John Dick Hepburn.
David Kirkpatrick J. McKinnon.
David Thorburn Symons.
James Bicknell.
Arthur Wellington Burk.
Lesslie Livingston Jackson.
Charles Creighton Ross.
Arthur Eugene Fitch.
Matthew Elliott Mitchell.
Robert Notman Ball.
George F. Cairns.
James Sidney Garvin.
Gerald Bolster.
Robert Christie.
Noble A. Bartlett.
Arthur Fred. James Spencer.
William Gilbert Macdonald.
Arthur William Johnson.

Articled Clerks.

William Henry Gordon.
Herbert Henry Bolton.
George Holmes Anderson.
Harold Victor Bray.
Edwin Duncan Cameron.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk, (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR JULY.

1. Tues...Dominion Day. Long Vacation begins.
6. Sun. ..4th Sunday after Trinity.
7. Mon. ..Heir and Devisee sitt. begin. Co. Court Terms (ex York) begin. Gen. Simcoe, first Gov. of U. C., 1792.
8. Wed...Treaty with Turkey. Cyprus ceded to England, 1878.
12. Sat. ..County Court Terms (ex York) end.
13. Sun. ..5th Sunday after Trinity.
14. Mon. ..W. P. Howland, first Lieut.-Gov. of Ontario' 1868.
15. Tues...Manitoba entered Confederation, 1870.
19. Sat. ..Quebec capitulated to English, 1629.
20. Sun. ..6th Sunday after Trinity.
22. Tues...Heir and Devisee sittings end.
23. Wed...Union of Upper and Lower Canada, 1840.
24. Thur..Canada discovered by Cartier, 1534.
25. Frid. ..Battle of Lundy's Lane, 1813.
26. Sat. ..Jews first admitted to House of Commons, 1858.
27. Sun. ..7th Sunday after Trinity.
30. Wed...First English newspaper published, 1588.

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LAW SOCIETY OF UPPER CANADA .....

Canada Law Journal.

Toronto, July, 1879.

The second edition of Mr. Henry O'Brien's *Division Courts Manual*, which has been announced for some time past as being in course of preparation is now ready. The first edition of this work, which was published some thirteen years ago, was favourably received by the profession, and we trust that this new edition, which the author has endeavoured to render as complete and useful as possible, may not be less fortunate than its predecessor.

The Digest is approaching completion. Part XVI ends with Trover, and it is said that two more numbers will complete the work. All will be glad to see it finished and none more so than the weary compilers. If any one wishes to ascertain how near he can come to the pattern of the patient patriarch, let him try his hand at making a Digest. The editors will at least have the satisfaction of knowing that their work has been done in a most satisfactory manner.

Very few judges possess the courage of Lord Justice Bramwell. In an appeal from Fry, J., involving technical questions upon old rules of practice in equity, after the Master of the Rolls, and James, L. J., had given reasons for reversing the decision of the judge of first instance, Bramwell, L. J., concurred in the following remarkable manner: "I have sat here to-day and listened to things which I do not think I ever heard of before, and therefore I may safely say I am of the same opinion and for the same reasons." *Luke* v. *South Kensington Hotel Co.*, 27 W. R. 517.

A grave and important question was lately submitted for decision to the Supreme Court of Illinois. In a trial for larceny, the judge limited the counsel on both sides to the space of five minutes for their respective arguments to the jury. The Court above, on error being brought, held that this was an unreasonably short time, and that the counsel for the prisoner was quite justified in declining to make any attempt to address the jury. The verdict was consequently reversed, and the cause remanded for a new trial: *White* v. *The People*, 8 Central Law Journal, p. 273.

PRIVATE RIGHTS AS AGAINST PUBLIC WRONGS.

Where a crime has been committed detrimental to the commonwealth, it is the duty of every man to prosecute, appear against, and bring the offender to justice. A prosecution for such a crime is a proceeding for the benefit of the public. Till the rights of the public have been vindicated by a prosecution for the public offence, the law does not recognise the rights of any individual particularly injured by the commission of the crime. No agreement or compromise between such an individual and the culprit, which involves the abandonment of criminal proceedings, is valid; nor can any such agreement form the basis of a civil action. In every case wherein an offence of a public nature has been committed, any agreement to abstain from instituting a prosecution in respect of it, or to forbear proceeding with a prosecution already begun is illegal, and contrary to public policy. In *Williams* v. *Bayley*, L. R. 1 H. L. 220, the law is admirably stated by Lord Westbury. "You shall not make a trade of a felony. If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself. If men were permitted to trade upon the knowledge of a crime and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and moral offence would be committed. That is what the old rule of law intended to convey when it embodied the principle under words which have now passed somewhat into desuetude, namely *misprision of felony*."

The Courts uniformly refuse to entertain cases based on agreements, the consideration for which, in whole or in part, appears to be the stifling of a prosecution for an offence of a public nature. It is not essential to induce the Court to hold its hand that a crime should have been incontestably committed—it is enough if the acts and conduct of the parties indicate that each of them has been acting on the assumption that a crime had been, in fact, committed. In such a case, the persons so dealing would be held estopped from alleging the contrary of that which was the foundation of the bargain: *per Palles*, C. B., in *Rourke* v. *Mealy*, L. R. Ir. 4 C. L. D. 166.

The result is more difficult of attainment where it appears uncertain whether or not an offence of a public nature had been committed. But if there are reasonable grounds for suspecting the fact of the crime, then the better opinion seems to be that, inasmuch as the public have an interest in ascertaining the truth and in having the accused person (if guilty) brought to trial, any agreement to abstain from prosecuting would be illegal: *per Coltman, J.*, in *Ward* v. *Lloyd*: 6 Man. & Gr. 789.

If a prosecution has been in fact instituted, any bargain for money or other consideration to end it is illegal; apart from the question whether a crime has been or has not been committed, and apart also from the question of the exis-

tence of reasonable and probable cause of the guilt of the defendant. This is on account of the criminal law having been actually set in motion; and then a duty arises from the individual to the State that nothing shall be done to intercept the course of criminal justice. In such a case it is of no consequence whether the person accused is innocent or guilty of the crime charged. To borrow the forcible language of Lord Denman: "if innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe": *Keir* v. *Leeman*, 6 Q. B. 308.

Of course, a mere threat of criminal proceedings, if there be no reasonable and probable cause for their institution, will not operate to avoid a compromise based on the relinquishment of such proceedings; though the party threatened may have a right to relief under another head of jurisprudence, if there has been duress, coercion, or intimidation.

The same principle also applies where the crime is itself of such a nature as to involve pecuniary loss to an individual, as, for example, in cases of embezzlement and forgery. In such a case the policy of the law is that the injured person cannot maintain his suit for the money demand until he has done his best to bring the guilty person to justice. This duty is sufficiently discharged if the person injured has preferred a bill of indictment which has been thrown out, or not proceeded with at the suggestion of the presiding judge, and he is thereupon remitted to his civil remedy: *Ex parte Ball, In re Shepherd*, 27 W. R. 563.

This last case we have cited is the most recent and perhaps the most instructive upon this subject. Bramwell, L. J., discusses most elaborately the reasons alleged for the opinion that the felonious origin of a debt is in some way an impediment to its enforcement, and fails to find a satisfactory solution in any of them. Baggallay, L. J., proceeds upon grounds hitherto recognised as sufficient, namely that the civil remedy is suspended only till public justice has been satisfied as laid down in *Dudley & West Bromwich R. R.* v. *Spittle*, 1 J. & H. 14. See *Reid* v. *Kennedy*, 21 Gr. 86.

Baggallay, L. J., also holds that the doctrine of suspension does not apply where the offender has been brought to justice at the instance of another person injured by a similar offence, or in which prosecution is impossible by reason of the death of the culprit, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence.

But upon this last point Bramwell, L. J., observed: "I am not sure that the law may not turn out to be this: that if the man goes abroad, and so the prosecution becomes impossible, that is the misfortune of the creditor, and he must wait till he comes back again. However that may be, there seems no doubt that when the crime has been committed in a foreign country, and the fruits of it are brought to this country, civil proceedings may be taken for their recovery in our Courts forthwith." This question arose in *The Merchants Express Company* v. *Morton*, 15 Gr. 274, and the present Chancellor then held that, in such a case, the reason of public policy that there must be prosecution to conviction, or acquittal, before a civil action could be maintained, did not apply. As observed by Wilson, J., in *Topence* v. *Martin*, 38 U. C. R. 411, the suspension of the civil remedy is a matter of local policy, and the courts of our country are not bound to vindicate the dignity of the foreign law.

PROPOSED ALTERATIONS IN THE LAW OF MASTER AND SERVANT.

There are at present four bills before the Imperial Parliament for extending the liabilities of public companies and other employers to their servants for injuries arising from accidents caused by the negligence of fellow servants. One is introduced by the Attorney General and may be termed the Government bill. The others are introduced by private members. The four bills were discussed in a paper read by Mr. Joseph Brown, Q. C. at a meeting of the Social Science Association, which is reprinted at length in the English *Law Journal* for May 31st, ult.

After mentioning the fact that the present law, which does not allow a claim against the master or employer in respect of such injuries, unless he has been guilty of carelessness in the selection of the servant who caused the mischief—has, of late years, been loudly complained of as unjust by those who put themselves forward as representing the working classes, Mr. Brown proceeds to discuss whether and how far the proposed alterations are just and expedient. The most sweeping bill is introduced by Mr. Macdonald, the well-known "working-man's candidate." It begins (sec. 1) by sweeping away altogether any defence founded on the doctrine of common employment in the same service, or on the fact that the injured servant of his own free will incurred the risk. His bill extends, moreover, even to domestic servants. This bill, Mr. Brown argues, is unjust: firstly, because it punishes employers where they are absolutely free from blame, apparently because they can afford to pay damages, while the doer of the injuries probably could not, which, he justly observes, is about as equitable as the story of a certain judicial functionary, before whom a young man was summoned for a debt, which he was unable to pay, but the creditor suggesting that the debtor had a rich aunt, the Judge is reported to have made an order for payment upon the aunt; secondly, because it very often punishes employers for accidents which arise solely from the disobedience or neglect of the men themselves; thirdly, because it alters, without consent, the express or implied terms on which the workmen were engaged. It might also, says Mr. Brown, prove highly impolitic by removing the stimulus to carefulness, and to habits of providence and forethought among the working classes.

At all events the Parliamentary Committee appointed to enquire into the subject, in their report in the year 1877, condemned Mr. Macdonald's proposal. It is on this report apparently that the Attorney-General's bill is based. The effect of this bill is to make the owners of railways, mines, manufactories, and "other works," liable to their own workmen for injuries caused by the neglect of any "servant in authority," which is defined as including all persons employed to manage the whole or any part of the works, but to exclude all others. This, too, Mr. Brown argues is unjust, as making the master liable for what he did not order and could not prevent, and for what is done by the manager, not in fulfilment of his duty, but in violation of it: moreover the employment of an experienced manager is to the advantage of the workmen themselves, and to the public, besides being often a necessity: and the managers are generally so well paid as to be quite able to meet the consequences of their own default. Nor again have the proprietors of mines, railways and large concerns any need of an additional stimulus to the careful selection of their managers.

The other two bills may be distinguished as Mr. Brassey's, and Earl de la Warr's, and are sufficiently similar to be considered together. These bills not only embrace the provisions of the Government measure, but go a good deal further, for they apparently embrace not only managers, but even foremen or overseers,—in fact, any one who gives orders to the men. Besides the objections already enumerated which apply also to these two bills, Mr. Brown urges that a foreman is really a fellow-servant, working with and among the men, who can always complain of any carelessness on his part. Both of these bills, moreover, make the employer liable for all injuries to a workman arising from defective works, machinery, plant, etc., thus putting it in the power of a malicious man discharged from the employer's service, to wreak his vengeance by doing some secret injury to a machine, so that it should break down or explode and injure the men, all of whose claims would fall on their master. The present law, says Mr. Brown, rightly treats such cases as unavoidable accidents, and holds the employer blameless, whether the injury happens to a stranger or to a passenger or a servant, provided always that every care was used in selecting, constructing and examining the engine or machinery which caused the accident (*Skerritt* v. *Scallan*, 11 Irish Reports, C. L. 389). In conclusion, Mr. Brown refers to a paper read by him before the Social Science Association, in June 1878, in which he advocated a system of compulsory insurance against all accidents of workmen employed in hazardous trades, to which both employers and workmen should contribute—a system which has been tried in Germany with the best results, and has been adopted in England by the largest and best managed mining and railway companies.

Such appear to be the main points of the paper we have been considering. In these days of Californian Constitutions, when men not only "make haste to get rich," but appear sometimes to think that to rob those who are rich already is no crime, it is well that the *justice* of measures bearing on the relation of employer and employed, as well as their expediency should be considered temperately point by point. And that this should be done, if national wrong-doing is to be avoided, is in no way less necessary on this side of the Atlantic, than in England.

LAW SOCIETY.

Easter Term, 42nd Victoriæ.

The following is the *resumé* of the proceedings of the Benchers during Term, published by order of Convocation :

Monday, May 19th, 1879.

The minutes of previous meeting were read and approved.

The Report of Examiners of Candidates for Call was received, read and adopted.

The Report of the Sub-treasurer was read as to the regularity of the proceedings of the Candidates for Call, finding that, of the gentlemen who passed, the following, namely, Messrs. N. D. Beck, John Morrow, G. E. Miller, T. T. Rolph and L. A. Olivier are in the usual course.

Ordered, That they be called to the Bar.

The above named gentlemen attended and were called accordingly.

Ordered, That the cases of J. C. Ross, E. Coatsworth, W. J. B. Read, M. G. Cameron and T. S. Jarvis, be referred to the Legal Education Committee for report.

Ordered, That the case of A. B. Klein be referred to a select committee for report.

Messrs. Benson, Irving and Robertson, appointed such committee.

The report of the Examiners on the Examination for Admission as attorneys, was received and read.

The report of the Sub-treasurer on their articles was read, finding that of the gentle-

men who have passed, the papers of Messrs. N. D. Beck, J. A. Williamson, John Morrow and E. J. Beaumont, are in the usual course.

Ordered, That they receive certificates of fitness.

The cases of Messrs. Read, Walsh, Claxton, Millar and Coatsworth, who had also passed, were referred to the Legal Education Committee for Report.

The report of the Examiners on the Intermediate Examinations was received and read.

The Sub-treasurer reported that all those who had passed their first Intermediate Examination as Students-at-Law and Articled Clerks had passed at the proper time.

Ordered, That their Examinations be allowed.

The Sub-treasurer reported that, of those who had passed their second Intermediate Examination, all except Charles Egerton Macdonald, who passed as a Student-at-Law, and Robert Miller had passed at the proper time.

Ordered, That their Examinations be allowed.

Ordered, That C. E. Macdonald's Examination be allowed him as a Student-at-Law only.

Ordered, That the case of Robert Miller be referred to the Committee on Legal Education for report.

The Report of the Committee on Legal Education was received and read.

Ordered, That the following gentlemen be entered on the books as Students-at-Law:—John Dickinson, B.A.; John McLaurin, B.A.; Antoine Philippe Eugene Panet, B.L.; Charles Reginald Atkinson, George McCullough, George William Ross.

Ordered, That Andrew Joseph Clarke be allowed his Examination as an Articled Clerk.

The Report of the Committee on Legal Education on the reference to arrange for the printing of the minutes, was received, read and adopted, and the Secretary ordered to communicate the substance to Messrs. Rowsell & Hutchison.

The Report of Mr. Hodgins, on the reference to him of arrangements with Government as to heating and lighting Osgoode Hall, was received, read and adopted.

A letter from Mr. Justice Osler, dated 8th March, resigning his seat as a Bencher on his appointment as a Judge of the Court of Common Pleas, was read.

Ordered, That a meeting of the Bench be specially called for the last Friday of this Term for the election of a Bencher in his stead.

Ordered, That Mr. Cameron's notice as to the writing up of the Parchment Rolls of the Society, stand till the 20th instant.

Ordered, That Mr. Crombie's notice as to the consolidation of the Rules of the Society, stand till the 20th instant.

Mr. Hodgins gave notice that at the next meeting of Convocation, he would move the following additional Rule in the order of proceedings for the first and other business days of Convocation—"Second reading of draft rules."

Mr. Robertson gave notice that he would, at the next meeting, move that it be an order of Convocation that the members of the Bench in future appear in Convocation in their gowns.

Mr. Hodgins gave notice of motion, for the 20th instant, That the printing of the Journals of Convocation be referred to a standing committee, to be appointed during Easter Term each year, at the same time as the appointment of the other standing committees of Convocation.

Mr. Bethune gave notice of motion, for the 20th instant, to confirm the appointment of Mr. Rolph as Chamber Reporter, notwithstanding that he was not called to the Bar at the date of such appointment.

Tuesday, May 20th, 1879.

The Report of the Special Committee on the case of Mr. A. B. Klein was received, read, and adopted.

The Report of the Legal Education Committee on the cases of Messrs. Welsh, Read, Claxton, G. E. Millar, Coatsworth, Ross, Jarvis, Cameron, and Robert Miller, was received and read, and ordered for immediate consideration.

Mr. Becher moved the adoption of the Report, saves as regards Mr. Claxton's case

and so much of Mr. Read's case as related to his certificate of fitness. Carried.

Mr. Read moved, That the report as to Mr. Claxton be amended, by allowing his second intermediate examination and his certificate of fitness. Carried.

Mr. Becher moved, That the report as to Mr. Read be amended, by allowiug his second intermediate examination and his certificate of fitness. Carried.

The Report of the Legal Education Committee on the cases of Messrs. Ede, Carey, Reddick, Scott, Lawson, Butler, Wallace, McDougall, Grayson, Sayers and Meyer was received, read, and considered.

Mr. Hodgins moved, That the Report be adopted, save as to the case of Mr. Ede, and that as to his case the report be amended, by allowing his first intermediate examination and his certificate of fitness. Carried.

Ordered, That Messrs. Scott, Lawson, Butler, Wallace, McDougall, Grayson and Sayers be allowed their examinations as articled clerks on payment of the usual articled clerks' examination fee.

Messrs. Ross, Coatsworth, Jarvis and Klein were called to the Bar.

Mr. Becher moved, That Mr. Stephen Richards be appointed to the seat on the Bench vacated by his own absence. Carried.

Mr. Crombie moved, That the Hon. E. Blake, Æmilius Irving, D. B. Read, Thomas Hodgins, John Crickmore, and the mover, be a Committee to examine and report on the Rules and Regulations of the Law Society of Upper Canada, and the resolutions and standing orders of Convocation, and to draft consolidated rules, regulations and orders, to be submitted to Convocation next Term. Carried.

Mr. Cameron moved that a Committee of the Bench be appointed to superintend the writing-up and completion of the Parchment Roll of the Society, and that Messrs. Read, Hodgins, Crickmore and the mover be such Committee, with authority to provide such clerical assistance to the Secretary as may be necessary for the purpose. —Carried.

Mr. Hodgins moved that the following be inserted as an additional, and the last, rule in the Order of Proceedings for the first and other business days of Convocation :— "Second reading of draft rules."—Carried.

Mr. Robertson moved, That it be an order of Convocation that the members of the Bench in future appear in Convocation on the first and second days of meetings in each term in their gowns.—Carried.

Mr. Hodgins moved that the printing of the journals of Convocation be referred to a Standing Committee, to be appointed during Easter Term each year, at the same time as the appointment of the other Standing Committees of Convocation.—Carried.

Mr. Hodgins, on behalf of Mr. Bethune, moved that the appointment of Mr. Rolph as Chamber Reporter be confirmed, notwithstanding that he was not called to the Bar at the date of such appointment.—Carried.

Mr. Irving gave the following notice for the next meeting of Convocation :—That whenever any County Council shall provide, free of charge, proper accommodation in the Court House of the said County, or Union of Counties, for a local law library, and whenever the members of the legal profession resident in such county have become incorporated under the provisions of the General Act for the Formation of Literary Associations, and have subscribed a fund or procured a Municipal Grant, or by donation of books for the purpose of such library, any sum not less than $750, the Law Society of Ontario shall grant to such local Library Association a sum equal to one-third of the amount subscribed, but not to exceed to any one Association the sum of $500, and to all such Associations the Law Society shall furnish, by way of further grant, the Ontario Reports and the Supreme Court Reports as published.

Mr. Hodgins moved that the Chairmen of the several Standing Committees and the Treasurer be appointed a Select Committee to strike the Standing Committees for the ensuing year, and that they do submit the names proposed for such Committee on Saturday, the 24th instant.—Carried.

Mr. Mackelcan gave notice, That he would move on the last Friday of Term

resolution providing that steps should be taken to secure the establishment of some satisfactory system for the receiving at Osgoode Hall of orders for copies of short-hand writers' notes in common law cases and for the delivery, through some officer at the Hall, of the copies required of such notes.

Mr. Hodgins moved, that the Secretary having stated to Convocation that there have been several thefts of books from the library recently, it be ordered that the subject be referred to the Library Committee for investigation, and report.

Saturday, 24th May, 1879.

This being the day for the election of Treasurer according to the provisions of the statute, and no quorum being present, the Hon. Edward Blake continues Treasurer by law for the ensuing year.

The Treasurer, no quorum being present, adjourned the meeting of Convocation to half-past 10 o'clock in the forenoon of Tuesday morning next.

Tuesday, 27th May, 1879.

The minutes of the meeting of May 20th, and the minute made on May 24th, were read and approved.

The Report of the special Committee appointed to strike Standing Committees was received, read and adopted.

The report of the Finance Committee, dated May 26th, was received, read and adopted.

Ordered, that 1,000 copies of this Report be printed and distributed to the Profession.

The Report of the Committee on Reports, dated May 27th, 1879, was received, read and adopted.

Mr. Ponton was called to the Bar.

Mr. Irving moved, that his notice on the subject of County Libraries be referred to the Select Committee already appointed on that subject, and that the Treasurer be convener of that committee.—Carried.

June 6th, 1879.

The minutes of last meeting were read and approved.

The Report of the Legal Education Committee of the 31st May, on the cases of G. H. Smith, G. Wornall Wilson, Lendrum McMeans, F. W. Garvin, and others; R. Miller and E. N. Lewis, was received, read, considered clause by clause, and the first five clauses were adopted. To the seventh clause Mr. Cameron moved in amendment that the allowance of the Second Intermediate Examination of E. N. Lewis be suspended and that the case be referred back to the Committee on Legal Education with a view to their giving Mr. Lewis an opportunity of making a statement of the facts before they report a final decision.—Carried.

The report as amended was adopted.

Mr. Hoskin, chairman of the Discipline Committee presented the report of that Committee on the reference of the petition of Mrs. Barker. The report was received, read and adopted.

Mr. Irving, Chairman of the Library Committee presented the report of that Committee dated 6th June, which was received, read and adopted.

Ordered, That the Finance Committee apply to the Government for the accommodation for telegraphic purposes suggested in the report.

Letters from Mr. Vankoughnet and Mr. Harman (Reporters) of 5th June, with their communication to the Chairman of the Reporting Committee, dated May 26th, on the subject of an increase to their salaries, were received and read.

As Convocation had already dealt with the matter this Term, the subject of these letters could not then be considered.

Mr. J. K. Kerr, Q. C., was elected a Bencher to fill the vacancy in the Bench caused by the appointment of Mr. Justice Osler.

Mr. Mackelcan moved, That, in order to enable practitioners to obtain without unreasonable delay and inconvenience, copies of the short-hand writers' notes of trials in Common Law cases, some officer of the Courts or member of the staff of short-hand reporters should be required to have a room in Osgoode Hall, and to keep there a record of the names and addresses of all short-hand writers employed as reporters, and of the times when, and places where they are so employed, and such officer or reporter

should be required to attend at his office in Osgoode Hall, every day during each Term, and during the week before the commencement of each term, to receive orders for, and deliver copies of short-hand reporters' notes, and should also arrange for the receiving and forwarding at all other times, of letters addressed to him at Osgoode Hall respecting such notes, and should attend to and answer all such communications, and do all that might be required for the obtaining and delivering, or transmitting of copies of such notes.

That a copy of this resolution be transmitted to the Attorney-General, who is respectfully requested to take the matter into his consideration at his earliest convenience.

Mr. Hodgins moved in amendment, that Mr. Mackelcan be appointed a Committee to represent to the Attorney-General the difficulties at present existing with reference to procuring notes from the short-hand reporters, with a view to the adoption of some scheme for removing these difficulties.

Mr. Maclennan gave notice that he would move at the next meeting of Convocation, that the salaries of the reporters be henceforth payable and paid monthly instead of quarterly.

Monday, June 24, 1879.

The minutes of last meeting were read and approved.

The Report of the Legal Education Committee on the cases of Messrs. Lewis, Hall, Shannon, Maxwell, McMeans, Scott, and Mortimer was received and adopted.

The report of same Committee recommending that in future a fee of two dollars should be payable on the presentation of every petition to the Benchers for special relief was received and adopted.

The report of the Discipline Committee on the case of a member of the Society charged with the improper removal of a book from the library was received and adopted.

The report of the Library Committee, dated 24th June, as to the abstraction of books from the library, was received and adopted.

The report of the Select Committee on aid to county libraries was received and read, considered clause by clause, amended, and adopted, as below :—

REPORT OF SELECT COMMITTEE ON AID TO COUNTY LIBRARIES.

To the Benchers of the Law Society, in Convocation :—

The Select Committee appointed "to enquire as to the practicability and expediency, and, if found practicable and expedient, to report a scheme for aiding in the establishment and maintenance of branch libraries in the county towns, for the use of the courts and profession," to which Committee was referred the proposed motion of Mr. Irving on the same subject, beg leave to report as follows :—

1. The Committee met on eleventh June, A. D. 1879. Present—The Treasurer, Mr. Irving, and Mr. Hodgins, and came to the following conclusions :

2. The establishment and maintenance of county libraries is a subject of very great importance to the profession, the courts and the public. From the necessity of the case, the country practitioners do not derive the same measure of advantage from Osgoode Hall library which is obtained by the Toronto bar ; and although the annual fees paid by the profession are now more than compensated by the reports provided for them, yet the profession generally has a just claim to consideration in the appropriation of the surplus revenues derived from other sources.

It is on these grounds expedient to aid in the proposed object.

3. The report of the Finance Committee of twenty-sixth May last, showing a considerable estimated surplus of revenue over expenditure, there is no difficulty, on financial grounds, in carrying out a plan for moderate aid to county libraries ; but it would be prudent, in view of the large fixed charges, the fluctuating character of the income, and the possibility of other demands, to limit the guaranteed yearly expenditure by the Society to a sum well within the estimated available surplus.

4. There is no impracticability on other grounds in aiding in the object referred to.

5. Any scheme for the purpose should promote, as far as possible, a just distribution of the aid in proportion to the local contributions to the same object ; and should involve a limitation of the maximum of aid, which would at once ensure its fair share to each county desirous of establishing a library, and prevent too great a drain on the resources of the Society.

6. The Committee find that, according to the last law list, the practitioners in

county or united counties number as follows :—

Algoma and Thunder Bay	4
Brant	17
Bruce	22
Carleton	46
Essex	16
Elgin	15
Frontenac	21
Grey	24
Halton	13
Hastings	43
Huron	32
Haldimand	10
Kent	20
Lennox and Addington	9
Lambton	14
Lanark	13
Lincoln	24
Leeds and Grenville	15
Middlesex	59
Northumberland and Durham	34
Norfolk	18
Oxford	28
Ontario	27
Peel	10
Peterborough	20
Prince Edward	6
Prescott and Russell	4
Perth	31
Renfrew	14
Simcoe	37
Stormont, Dundas and Glengarry	18
Toronto	260
Victoria	21
Wentworth	75
Wellington	45
Welland	14
Waterloo	18
York	7

Making a total of 1104. Of these, so far as the Committee can estimate, about 1,020 are actually engaged in practice. To ascertain the estimated number it would, therefore, be necessary to reduce the number above given by an average of about eight per cent. Toronto and York (numbering 267) as having full use of Osgoode Hall library, and Carleton (numbering 46) as being allowed access to the Parliamentary library, may be excluded from the calculation. This would reduce the number to 791; deducting 8 per cent., there remain 728 practitioners, more or less, likely to avail themselves of a proper scheme.

7. The Committee propose the following scheme :—

(1) That a standing committee be formed, to be called The County Libraries Aid Committee, to which shall stand referred all correspondence on the subject, and which shall have power, subject to the directions of convocation, to work the scheme as far as the Society is concerned; the Finance Committee retaining its control over expenditure.

(2) That the practitioners in any county or union of counties may form a library association, under chapter 168 of the Revised Statutes of Ontario, by the name of "the (name of county town or the county, or union of counties) Law Library or Law Association."

(3) That it shall be provided by the constitution of the Association, that—

(*a*) The trustees thereof shall hold all the books thereof on trust, in case of the dissolution or winding up of the Association, or the disposal of its property, to satisfy and repay to the Law Society all sums advanced by the Society to the Association.

(*b*) That a room for the custody and use of the books, and proper arrangements for their custody, shall be provided, if possible, in the Court House.

(*c*) That the books shall be for the use of the judges of the county and of those practitioners who become members of the Association and pay the prescribed annual and other fees, and also for the use, during Courts and hearings before the Master in Chancery, of the judges and of all members of the profession residing out of the County.

(*d*) That the prescribed annual and other fees shall not exceed for those practitioners who do not keep offices in the county town one-half of the amount fixed for those who do keep offices in the county town.

(*e*) That at least one-half of the said fees and the whole of the aid at any time granted by the Law Society shall be applied in the purchase, binding and repairing of books for the library.

(*f*) That the Association shall make an annual report to the Law Society, shewing the state of its finances, and of its library, with such other particulars as may be required by the Standing Committee.

(4.) That the Association shall transmit to the Law Society proof of its incorporation and a copy of its declaration and by-laws containing the above provisions, and proof of the condition of its funds and library; and proof that it has acquired a suitable room therefor, with such other particulars as may be required by the Standing Committee.

(5.) That the Standing Committee being satisfied that the conditions above named have been complied with, may report thereon to the Finance Committee; stating the amount to which on the principle hereinafter stated the Association is entitled, and thereupon the Finance Committee may authorize payment thereof.

(6.) That, it being expedient (with the view of encouraging the formation of the libraries), to grant more liberal aid during the early years after their institution, the

grant in aid from the Society shall be for the initiatory or first grant, an amount double the amount of the contributions in money actually paid, or of the value of books actually given, from all local sources, such grant, however, not exceeding a maximum sum of six dollars for each practitioner in the County or union of Counties; and for each of the first, second, and third years an amount double the amount of the fees actually paid by such practitioners to the Association, such grant, however, not exceeding a maximum sum of $4 for each such practitioner; and for each of the fourth and fifth years an amount equal to the amount of the fees so actually paid; such grant, however, not exceeding $4 for each practitioner, and that after the end of five years, by which time the working of the scheme will have been tested by practical experience, the whole question be open for reconsideration.

(7.) That such annual grant be payable on the 31st day of December in each year next after the termination of the fiscal year of the Association, provided the required reports and information have been supplied on or before the first day of the said month of December; and that in case of default the grant be not payable for three months after such reports or information have been supplied.

(8.) That the Standing Committee shall report to Convocation on the first day of Hilary term in each year on their operations for the previous year.

(9.) The Committee in conclusion desire to point out that the maximum charge on the funds of the Society under the proposed plan, even on the improbable supposition that libraries will be formed in all the Counties named would be for the initiatory grant $4,368, and for the subsequent yearly grants $2,912, irrespective of the slight yearly increase in the number of practitioners. This would be considerably in excess of the annual expenditure on the library at Osgoode Hall.

Edward Blake,
Chairman.

June 17th, 1879.

Mr. Hodgins moved the suspension of Rule 8.

Mr. Hodgins moved that the following rule be read a first time, namely:—That branch law libraries for the use of the Courts and the profession be established in each county town, on the conditions contained in the scheme above set forth.

Mr. Hodgins moved, That the rule be read a second time. Carried.

Mr. Irving moved, That the following gentlemen be appointed the County Libraries Aid Committee, namely—Messrs. Hoskin, Kerr, Miller, Robertson, Meredith, Hector Cameron, and Benson.

Mr. Robertson moved, that 1,000 copies of the Report and Rule as to County Libraries be printed and distributed to the profession. Carried.

A letter from the telegraph operator, asking for leave of absence during the long vacation, was referred to the Finance Committee.

A letter from the assistant in the library, asking for leave of absence, was referred to the Library Committee.

The Secretary laid before Convocation the bill of costs of the Solicitor of the Society, which was referred to the Finance Committee, with power to act.

Mr. Maclennan moved, that the salaries of the reporters be, after the 1st of October next, payable monthly, instead of quarterly, subject to the production of the usual certificate of the Editor. Carried.

Mr. Hodgins moved, That Mr. J. K. Kerr's name be substituted for that of Mr. Leith as a member of the Committee on the Journals of Convocation. Carried.

The Library Committee's report of the 24th June as to the tenders for the new descriptive catalogue, was received, read and adopted.

SELECTIONS.

THE LAW OF EVIDENCE AND THE SCIENTIFIC INVESTIGATION OF HANDWRITING.

(*Concluded.*)

Thus, an alleged forged agreement was brought into court, in which it was admitted that the body of the instrument was written by the party claiming under it, while the signature, it was contended, was in the handwriting of one member of the firm, against which the claim was made. There were quite a number of witnesses who testified to the belief of the genuineness of the signature, one of them being a so-called expert, while as many from the same data gave a contrary opinion. I found upon an examination

of the document, that the anatomy of the handwriting of the signature was quite different from that of the alleged signer, while the signature itself and the writing in the body of the paper agreed in this respect, that is as to its principles of structure; one party writing in what I call the looped style, that is, making a looped letter whenever practicable, while the other, in every case where it was possible to do so, avoided any such form of letter.

In a case in a commercial house where an embezzlement to a considerable amount was discovered, the alterations which were made in order to conceal the fraud were seen to be *fac similes* of the handwriting of one of the two clerks who kept the books. These alterations, however, might have been made by the other clerk, he imitating the handwriting of the first, in order, in case the fact was discovered, to clear himself by casting suspicion upon his fellow clerk. The question thus submitted without other testimony would seem to rest for its decision upon a comparison of the handwriting alone. This, as I have already shown, might work the greatest injustice in a case like the present, confounding the innocent with the guilty. The altered words and figures were to all appearance, in every respect like the handwriting of one of the parties, as before stated. Upon examining the principles upon which they were formed, a perfect correspondence was seen to exist here also, while upon a similar examination of the writing of the other clerk a very marked difference was observable, and much of this difference could only be seen through the aid of the microscope; hence I felt warranted in coming to the conclusion that the alterations were the work of the clerk whose handwriting they so closely resembled. It is possible, perhaps, to imitate a handwriting by the very means and the very manner in which the original was executed. But this would, of course, necessitate the use of the microscope in the first place, and a good deal of after practice in order to its successful accomplishment If it should occur in a given case and there should be no other means of detection, the expert would have no right to come to a conclusion, as it would in such a case be no better than guessing. I use the word "conclusion" in this paper in the sense of a necessary consequence, that is, to the mind of the expert. And under these conditions he might perhaps be allowed to state his conclusions to the jury, but not in this case or any other, without at the same time being called upon to give the grounds of such conclusions.

Another case which took place in an adjoining state, still further illustrates the value of this method of examination, and also of that usually resorted to in such cases. This case involved the forgery of five separate notes, all purporting to be endorsed by one party, this endorsement alone giving them any value. This gentleman, the alleged endorser of the note, was quite aged, and wrote a very fine, tremulous hand; viewed by the unaided eye the imitation appeared almost perfect, and was sworn to by those persons whom the law recognises as competent witnesses in such cases. On making a magnified copy of this signature, I found that the tremulous appearance of the letters was due to the fact that they were made up of a series of dashes standing at varying angles to each other, and further, that these strokes thus enlarged, were precisely like those constituting the letters themselves in the body of the note which were acknowledged to have been written by the alleged forger of the signature. Upon the introduction of this testimony, the criminal withdrew the plea of not guilty and implored the mercy of the court.

In reviewing these cases it will be seen that any number of competent witnesses, and a majority of them I do not doubt, perfectly honest in their opinions or guesses, can be got to testify on either side of the question, well illustrating the value of this class of testimony.

"The teller in a bank is a competent witness when he has paid the checks of the party whose handwriting is involved in the question, provided he has not paid forged checks purporting to have been made by such party; this renders him incompetent." He would be competent, however, no matter how many such checks he may have paid, provided he has seen the party write once, and then only his name.

An expert may be called upon to testify as to which writing was made first in cases where the pen strokes are seen to cross each other. This is sometimes a most important matter, as upon such testimony the decision of a case may wholly depend.

In two recent cases, the possession of property to the amount of more than half a million dollars was determined by such a fact. From the investigation which I have made, I cannot doubt that in nearly all the cases of this kind, as well as where the age of documents has been decided, or the testimony in regard to this fact at all influenced, by their appearance alone, even when a magnifying glass has been used, that such decision has been based entirely upon guessing. In one of the cases referred to above, the signatures were written with different inks, the letters in one crossing the other. The question to be decided was the order of sequence in the writing. To the unaided eye, and under the use of magnifying glasses also, one ink showed very clearly over the other, and had I been obliged to decide the question on such data alone, I could have come to but one conclusion, and this, as it proved, would have been the wrong one.

I was able to demonstrate the facts in the case by wetting a piece of paper with a compound which acts as a solvent of ink, and then pressing this paper upon the writing in question, whereby a thin layer of ink was transferred to the prepared paper, at once settling the matter in dispute by showing which was the superposed ink.

As a result of my experience in this case, I was led to make a series of experiments with reference to determining this one fact, though, as in all such cases, others came up which helped to determine still others.

I took for the purpose of my experiment ten of the most common kinds of ink found in the market, and drew a series of lines, three in number, with each kind of ink, across a sheet of paper. This was followed by a similar series drawn diagonally across the first, thus forming a hundred points of crossing, and placing each kind of ink above and also under all the others. In thirty-seven cases out of the hundred, the eye, with or without the glass saw the under ink as if it were on the surface; in forty cases nothing could be decided in this respect; the balance told the truth of the matter. By the other method, that is, by the use of the solvent, the true facts could be made plain in every one of these cases. This experiment, as will be seen, was made with ten kinds of ink more or less differing from each other in colour and in chemical composition, and it certainly proves that all such testimony, as I have said, has been thus far no better than guess work.

But suppose the same kind of ink is used in a given case, here other methods of investigation must be resorted to.

The question may be determined as I was able to determine a similar one in the case of the *City of Chicago* v. *Gage et al.*, where the first strokes of the pen, forming channels as it were, and disturbing the size on the paper, allowing the ink in the crossing lines to flow to some distance in these channels, thus causing there a double thickness of ink which was clearly visible to the naked eye. There may be circumstances in these cases preventing this outflow of ink; or if it does take place, so mingling the ink in the crossing lines as to hinder the fact from being seen. Again it might be determined by settling the question of age by chemical and other means applied to the writing itself.

If all these resources fail us we can then, under the rulings of the court, resort to the usual method of forming an opinion through the process of guessing.

In a case where the validity of a note depended upon the fact whether the words and figures constituting the date of the endorsement were written at the time with the other words of the endorsement, I was able to decide the question by showing that they were not only more recent, but that they were written with a different kind of ink. The party swore that after having written the words constituting the assignment of the paper, he noticed that he had not dated it, and that he "then and there, with the same pen and with the same ink wrote the date over the other words." I was able to confirm my conclusions in this case,

through experiments for ulterior purposes, by means of the photographic process. I had a photographic copy of the writing made in order to compare it with that on the inside of the instrument. The photograph not only copied the forms of the letters in this case, but it also took notice of the difference in colour of the two inks, thus confirming the accuracy of my own deductions.

The photograph is able to distinguish shades of colour which are inappreciable to the naked eye; thus, where there is the least particle of yellow present in a colour it will take notice of the fact by making the picture blacker, just in proportion as the yellow predominates, so that a very light yellow will take a deep black. So, any shade of green, or blue or red, where there is an imperceptible amount of yellow, will print by the photographic process more or less black; while either a red or blue, verging to a purple, will show more or less faint, as the case may be. Here is a method of investigation which may be made very useful in such cases, and which will give no uncertain answer. Indeed, its testimony may be said to amount to a demonstration. Greenleaf, in his work on Evidence, vol. 1, sec. 1, says, "none but mathematical truth is susceptible of that high degree of evidence called demonstration, which excludes all possibility of error." In spite of this dictum I have used the word demonstration several times in this paper, and as I hold that scientific testimony which does not amount to a demonstration, should (in that class of cases susceptible of scientific accuracy), have little weight in a court of justice, I wish to bring it to a still further test. In a paper involving some thousand dollars, an alteration had been made, which, as was alleged, entirely changed the direction in which the property was intended to be bestowed by the maker of the paper. The alteration was admitted, but was sworn to as having been made by the original party immediately after writing the paper, he himself being dead at this present time, and the only living witness being the one so attesting.

This witness swore that the party "then and there," as in the case before quoted, "made the alteration at the same time and with the same pen and ink with which the other portion of the paper was written;" he added that "there was only one kind of ink in the room at the time." Upon examination I found that all of the paper, with the exception of that part where the alteration was made, was written with an ink composed of nut-galls and sulphate of iron, while the other ink was made of analine and Prussian blue. Does it not amount to a demonstration that the whole paper could not have been written with one and the same kind of ink? This is certainly in accordance with the received definition of the word *e. g.*, demonstration, the exhibition of one truth as the consequence of another, &c.

The proof of the age of a document which is sought to be established by the appearance of the paper is, if possible, less reliable than by the comparison of the handwriting by the ordinary methods. I have repeatedly examined papers which have been made to appear old by various methods, such as washing with coffee, with tobacco-water, and by being carried in the pocket near the person, by being smoked and partially burnt, and in various other ways. I have in my possession a paper which has passed the ordeal of many examinations by experts and others, which purports to be two hundred years old, and to have been saved from the Boston fire. The handwriting is a perfect *fac simile* of that of Thomas Addington, the town clerk of Boston two hundred years ago, and yet this paper is not over two years old.

It will thus be seen that in my opinion, under the present rulings of the courts, there is no species of evidence less to be relied upon in regard to the genuineness of documents than that furnished by the (superficial) examination of the documents themselves, and that this is wholly due to the methods of examination, and not in the least degree inherent in the nature of the subject itself. Such are the iron rules which govern these investigations, and so unwilling are scientific men in most instances to subject themselves to the ignorance and bigotry of unprincipled lawyers, that they avoid, as far as possible, having anything to do with such matters, and therefore the name "expert" has got to mean anything

other than what the term implies. Witnesses, if dishonest, will be governed by their interests; if honest and ignorant, by their prejudices; and thus, of course, both classes testify on the side which employs them, and as they can only give an opinion, which opinion at best is merely a guess, a trial merges itself into a thing of management, in which the most skilful strategist gains the victory. The jury are instructed "to weigh the evidence," and as they have no philosophers' scales in which mountains could be balanced against atoms of sense with which to perform the act, each party strives to make it appear that he has the greater weight of evidence on his side; hence the imposition of high-sounding titles: and, as I have noticed before, the introduction of all that class of management which strives to make the lesser reason appear the greater, and thus impose on the jury. If the witness chances to be both intelligent and honest, the condition of things is no better; for, as I have shown before, he can only give a mere guess in any case under the existing methods in some of the courts.

I have said that the present unreliability of this class of testimony is not inherent in its nature, but under proper rulings, scientific witnesses (and these alone should be employed where the investigation is of a scientific nature), would be able to give absolutely reliable testimony in many cases, and where they were not able to do so they would state the fact, and thus remove all elements of guessing from this class of evidence. Further, the scientific witness should be allowed, indeed, should be obliged, as I have said before, to show and explain as far as possible the methods by which he arrives at his results. Thus, where a paper had been wet by a solution of tannic acid, for a fraudulent purpose, it was easy to show the fact by touching the yellowed paper with a solution of sulphate of iron, when the trick was at once made evident by the dark discolouration of the spot where the fluid was applied. The opinion of experts, and all who saw this paper, was that the writing was very recent, on account of its fresh appearance, this very freshness being the result of the washing with tannic acid. Thus also in a case of *tromp-d'œil* in a French court; the ring or border of paste which had previously united the two papers could at once have been brought in view by washing the paper with a solution of iodine. It seems that in the French courts every manipulation or experiment necessary to elucidate the truth in the case, even to the destruction of the document in question, is allowed, the court as a matter of precaution being first furnished with a certified copy of the same.

In the many cases of the alleged fraudulent papers put in my hands for examination, I have rarely found any insurmountable difficulty in coming to a conclusion, such conclusion being based upon the principles which I have set down as requisite in my opinion, to be acted upon in all this class of testimony. As in cases involving blood examinations, each case must be investigated by itself alone, as in almost every case new facts present themselves. Still general principles may be laid down so that with the aid of the microscope and other necessary instruments, and chemical re-agents, one may be prepared to solve this class of questions with almost unerring certainty, or at least to avoid coming to any wrong conclusions. Thus it will be seen that as I view the subject, this important class of testimony in all its phases, as now managed in the courts, so far from furthering the ends of justice, is more calculated to favour the wrong-doer; that there is no inherent necessity of such a condition of things, either in the nature of the subject itself, or in the present state of scientific knowledge; but that the fault is wholly due to the practice of the courts, which are governed in this respect, in most cases, by tradition and precedent rather than by logical reasoning or scientific deduction.

R. U. Piper, *in Am. Law Journal.*
Chicago, Ills.

WHAT IS A PROMOTER?

The duties and liabilities of the promoter of a company have of late years so rapidly developed, that he may now be considered fully created as a legal entity, subject always to his infancy being

blighted by Courts of Appeal; and the history of his birth and growth may be clearly traced. In the beginning, the promoter, like the world, was legally without form and void, and he did his best to cover himself with darkness. It was to the interest of those persons who represented him in the flesh to assert his insignificance. He loudly protested that he was nobody; he was not a director, trustee, or agent of the company; he had never put himself forward in any shape or form; and, if he ever had any existence entailing tangible duties, they all disappeared when the company was formed, as the chrysalis disappears when the butterfly spreads its wings. If he was anything at all, it was an honest capitalist who advanced money when no one else was able to do so, and who did a great deal of work for a very reasonable percentage. All this was very plausible; but still the hard fact remained that, while every one else had lost money over the company, the promoter alone had made money. This gave shareholders some confidence in the strength of the law to make promoters disgorge. Still, there were many legal difficulties in the way. Equity was thought more likely to assist the shareholder than Common Law: but in Lincoln's Inn there was a respectable body of opinion that the promoter would never be held to fill a fiduciary relation to the company. Men who have since risen to the bench thought that the doctrines of trusteeship had so far become stereotyped, as not to admit of this new development. The Courts, however, early began to decide against the promoter. Not only did they clothe him with the duty of the highest degree of good faith, but they pronounced him a trustee. The word was fatal. Calling a man a trustee is giving a dog a bad name; and it is a mercy to hang him at once. The promoter, when attacked, was not only deprived of his magnificent profits, but was even stripped of his commission; and in one case it became a question, when the company offered its promoter, out of charity, a reasonable remuneration in its own statement of claim, whether the Court would sanction such a compounding with the evil one.

The case of the *Emma Silver Mining Company* v. *Lewis & Son*, decided last week, is the latest of the series of cases in which the war has been carried into the promoter's camp. It may be said to be the apex of the pyramid, of which the *New Sombrero Company* v. *Erlanger*, 48 Law J. Rep. Chanc. 73, is the base, *Bagnall* v. *Carlton*, 47 Law J. Rep. Chanc. 30, is the middle. The Sombrero case decides that a promoter is in a fiduciary relation to the Company, thus finally putting an end to the doubts which have been expressed on the point. This relation being established, the Court of Appeal decided in Bagnall's case that it involves the restoration to the company of the promotion money which has been intercepted out of the subscribed capital. Thirdly, the Common Pleas, in the Emma Mine case, held that there is no legal definition of a promoter; but that if a man has contingent interest in the subscribed capital of a company when formed, and does anything to help along its formation, or the subscription to its shares, a jury may well find him to be a promoter. The consequences of that relation had already been applied by Mr. Justice Denman to the case of the Messrs. Lewis. His decision, on further consideration, is reported in the April number of the *Law Journal Reports*, and may be looked upon as a further application of Bagnall's case. We have thus the three questions dealt with—Is a promoter a trustee? is he liable for profits? and who is a promoter?

Practically, perhaps, the third of these questions is as important as any. Most who have had anything to do with companies would rather be sure that they have not made themselves promoters at all, than run the risk of having it proved that they have done something which promoters ought not to do. In order thoroughly to understand the Emma Mine case, it is necessary to know the history of the action. It was an action claiming damages against the Messrs. Lewis for conspiring with the vendor of the mine to palm it off on the company at an excessive price. It also claimed 5,000*l.*, being the value of 250 shares given by the vendor to the Messrs. Lewis. Upon the question of conspiracy the jury were divided in opinion; but they found

that the Messrs. Lewis were promoters of the company, and, as such, ought to repay the 5,000*l.* with interest. This explains how the question of promotership, which is an issue usually determined by a judge, came to be submitted to a jury. The jury being doubtful on the question of conspiracy, the damages in respect of which would have been very great, naturally had little difficulty in assisting the company to recover what had been taken out of the pockets of the shareholders and put into those of Messrs. Lewis; but the question for the Court was, whether there was evidence on which the verdict could be founded. Messrs. Lewis, there was no doubt, had agreed with the vendor to do all they could to assist him in the promotion of a company to buy the mine; but there was equally no doubt that the plaintiff company, as a legal entity, had, in fact, been formed independently of their help. They had introduced the vendor to two mining agents; but neither of these agents had been able to undertake the formation of the company, which was ultimately brought out under the auspices of Mr. Albert Grant. It was, therefore, fairly argued that the grounds on which promoters had been held to fill a fiduciary relation in the Sombrero case were not satisfied in this case; the grounds assigned for the relation in the Sombrero case being that Messrs. Erlanger had in their hands the moulding of the company, the framing of the memorandum and articles of association, of the prospectus and so on. The Messrs. Lewis did none of these things; so that it must now be taken to be the law that it is not essential to the character of promoter that the form and fortunes of the company should be in his hands. On the other hand, Messrs. Lewis were referred to in the prospectus as possessed of knowledge about the mine, and they had answered questions from intending shareholders in a manner likely to induce subscriptions. They were, moreover, in full possession of knowledge about the mine and about the reports which had been made upon the mine which, if disclosed, was not likely to advance the purchase of the property, and which they did not disclose either to the company or intending shareholders Further, they had so far acted in concert with the vendor as perhaps to make him their agent in preparing the constitution of the company. The judgment of the Court studiously avoids basing the decision on any one of these facts or series of facts. It cannot be said that conduct conducing to the taking of shares is in itself sufficient to constitute a promoter. Still less can it be said that keeping silence in respect to material facts known to the alleged promoter is enough. Neither has it been laid down what form of authority will constitute promotion through an agent. All that the decision comes to is that these facts are material to be considered; and the matter is left just in that position of uncertainty which will be most frightening to persons who have been mixed up with companies to their own profit, and most encouraging to shareholders who have made bad bargains. He would be a bold man who should advise any person who has made money out of a company that he will not be held to have been a promoter. Juries are inclined to find in favour of companies in such cases, and the judges are disinclined to disturb such findings; while there is absolutely no exhaustive definition of what amounts to a promoter. —*Law Journal.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From Chy.]

ARMSTRONG v. McALPINE ET AL.

Will—Construction of.—

The testator devised the use and control of all his property, real and personal, to his wife until his two sons W. and H. were 21 or until the property should be disposed of as thereinafter mentioned. He then gave the north half of his farm to W. to be possessed by him when of the full age of 21, and directed him to pay certain pecuniary legacies to three of his daughters. He gave

H. the south half at the full age of 21 years, and directed him to pay pecuniary legacies to two of his daughters. The will then proceeded in the following language, "also my two sons, H. and W. above named, give my beloved wife a comfortable support or the sum of ten pounds annually, during her natural life, said support or annuity to commence at the time my said younger son H. shall possess his share of said property. I also will, that my above named sons W. and H. do not sell or transfer the said property without the written consent of my said wife, during her life."

Some years after attaining his majority, H. mortgaged to the defendant McAlpine, without his mother's consent, and having made default in payment the land was advertised for sale. The widow thereupon filed her bill, praying for a declaration that H. had no power to sell, transfer or mortgage without her consent in writing, and for an injunction to restrain McA. from selling or dealing with it to her prejudice.

A decree was made by V. C. declaring that, according to the true construction of the will, H. had no power to sell, transfer or mortgage the land during the plaintiff's life, without her consent in writing.

Held, reversing the decree, without deciding whether such a restraint upon alienation without a gift over was effectual, because the plaintiff had no right to require its determination, and if adverse to her contention such an opinion would not bind the heirs, that she had no indefeasible right to reside upon the land and thereby prevent its alienation, for there was the option of paying her an annuity in money; and the mortgage did not interfere with her right to this payment as a charge upon the land.

As the defendant offered to give the plaintiff a decree for a charge on the land, if that were necessary, she was ordered to pay the costs up to and inclusive of the decree, and the appellant was refused the costs of the appeal, as he did not take the objection which was given effect to in his reasons of appeal.

Boyd, Q. C., for the appeal.
O'Leary, contra.

Appeal allowed.

From C. C. York.]

Imperial Bank v. Beatty.

Promissory note—Double stamping—Necessity for replication setting up double stamping under 37 Vic. cap. 47.

Action on promissory note—Pleas.—1. Note not properly stamped when made.—2. Stamps not properly cancelled.—Issue on pleas.—*Held*, that under cap. 47 of 37 Vict., evidence as to the innocence of the holders and as to the time when they first acquired knowledge of the defect in stamping, and of double stamping as soon as they acquired knowledge, should have been received without a special replication of double stamping, this being, under the statute, matter to be shown to the satisfaction of the *Court or judge*, and, therefore, not requiring to appear upon the record and not being for the consideration of the jury.—*Held*, also that though such a replication is not necessary, it would be proper, the pleas constituting only a conditional defence.

R. Martin, Q. C., for respondent.
Shepley, for appellants.

From Chy]

Beatty v. Haldane.

Suit against administrator pendente lite.

A bill having been filed in the suit of *Wilson* v. *Wilson* to set aside the will of J. W., one H. was appointed administrator *pendente lite* after proceedings to rehear a decree setting aside the will. The decree was affirmed, after which a prior valid will was proved by the present plaintiffs J. W. and C. B. as executors, the latter having also been an executor under the former will and one of the plaintiffs in *Wilson* v. *Wilson*, on the 16th March, 1877. In Oct., 1876, before the order upon rehearing, an order was made that H. should pass his accounts as administrator, and a report was made on the 5th March, which determined the result of his dealings with the estate. Shortly afterward the plaintiffs J. W. and C. B. filed a bill against H. and D. solicitor for the plaintiffs in the former suit, charging that H. employed D. as his legal adviser in all matters connected with the estate; that D. received large sums of

money which he did not hand over for a long time; that on passing H.'s accounts the Master referred to the taxing officer for moderation of D.'s bill of costs, and refused to allow C. B. to appear on the inquiry; that at the procurement of D. another solicitor was appointed to represent H.; that he did not oppose the allowance of many objectionable items, and that H. had received sums of money for which he had not accounted, and prayed that the accounts and bill of costs might be opened up and that the defendants might be ordered to pay into Court such sums as may have been overpaid or wrongly allowed.

The proceedings in which the costs complained of were incurred had not been sanctioned by the Court, and were undertaken by H. upon his own responsibility.

Held, that an administrator *pendente lite* is amenable by a suit in equity and that H. was liable to account to the plaintiffs.

Held, also that the plaintiffs were right in not having proceeded by petition in the suit of *Wilson* v. *Wilson* in which J. W. was not a party, and C. B., though a party, did not represent the beneficiaries under the will first.

Held, also that the bill must be dismissed as against D., for if H. had improperly paid him costs out of the estate, H. was liable and there was no privity between D. and the plaintiffs.

Maclennan, Q. C., and *Haverson*, for the appellant.

Spencer, for defendant Donovan.

Donovan, for defendant Haldane.

From C.P.]

Austin v. Gibson.

Principal and surety—Giving time to principal—Discharge of surety.

The testator, who was surety in a covenant for the payment by the defendant, Scott, of a sum of money, died, leaving a will by which he appointed Scott and the other two defendants executors. After his death, Scott, on his own behalf, made various payments on account of the debt, and being unable to pay the balance, some $1,152, when due, he got the plaintiff to take his promissory note therefor payable in three months, Scott having arranged with his bankers to discount this note on which plaintiff got the money. When the note matured, part of the amount was paid by Scott and the balance renewed by another note of Scott's endorsed by the plaintiff as before, the last renewal being for $618, which amount the plaintiff sought to recover in this action against the defendant as executor in the deed of suretyship. In the dealings between plaintiff and Scott as to the promissory note and various renewals, no reference was made to the estate of the surety nor to the deed—and the co-executors of Scott had no knowledge or notice of such dealings.

Held, affirming the judgment of the Common Pleas, that the dealing between plaintiff and Scott had the effect of releasing the liability of the estate of the surety—notwithstanding that Scott was at the time of such dealing one of the executors of the surety.

Spencer for the appellant.

MacKelcan, Q.C., for the respondent.

Appeal dismissed.

From Q. B.]

Rooney v. Rooney.

Trinity Term—Sittings of the Court dispensed with—When rules nisi to be made—Power of Court.

Held, affirming the judgment of the Common Pleas, that when the Court has dispensed with its sittings during Trinity Term, motions for new trials in cases, tried at the summer assizes at Toronto, need not necessarily be made during the first four days of Trinity Term, as under section 13 of R. S. O. c. 39., unless judgment has been entered, such a motion may be made at any time during vacation (which includes Trinity Term) to a single Judge sitting for the Court.

McMichael, Q.C., for the appellant.

Haverson, for the respondent.

Appeal dismissed.

From Q. B.]

In re Yeomans et Ux. and the Corporation of the County of Wellington.

Property abutting on highway — Raising highway—Injuriously affected—Compensation, 36 Vict. c. 48, sec. 373, O.

Held, affirming the judgment of the Queen's Bench, that the owners of property abutting upon a public highway are entitled to compensation from the municipality under the Municipal Act, 36 Vict. c. 48, sec. 373, for injury sustained by reason of the municipality having for public convenience, raised the highway in such a manner as to cut off the ingress and egress to and from their property abutting upon the highway, which they had formerly enjoyed, and to make a new approach necessary.

The cases upon the subject reviewed.

C. Robinson, Q.C., for the appellant.

Cattanach, for the respondent.

Appeal dismissed.

From Q. B.]

Frey v. Wellington Mutual Insurance Co.

Fire Insurance.

The 52nd section of the Mutual Fire Insurance Companies' Act, under which the defendants were incorporated, provides that "in case of loss or damage, the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences and examinations called for by or under the policy must be furnished to the company within 30 days after said loss, and upon receipt of notice and proof of claim as aforesaid, the board of directors shall ascertain and determine the amount of such loss and damage—and such amount shall be payable in three months after the receipt by the company, of such proofs."

Held, affirming the judgment of the Queen's Bench, that the above section does not prevent an action being brought before the expiration of the three months where the directors have refused to pay the claim; its object being to afford that period for payment without suit where the directors choose to determine the amount.

C. Robinson, Q.C., for the appellant.

Bowlby, for the respondent.

Appeal dismissed.

From Q. B.]

McQueen v. Phœnix Insurance Co.

Fire insurance—Assignment—Non-ratification of.

The defendants' agent issued an interim receipt to the plaintiff on the 19th Nov., 1877, for 30 days and on the 28th November the plaintiff assigned to one M., in trust for his creditors the insured property —which was destroyed by fire on the 15th January, 1879. The policy issued after the fire. It appeared that when the assignment was made the defendants' agent was expressly notified thereof and assented thereto and stated that no notice to the company was necessary.

[No application was made under section 41 of the Mutual Insurance Companies' Act, to ratify the insurance to the alienees, but the policy issued in the terms of the application to the plaintiff.

Held, reversing the judgment of the Queen's Bench, that the plaintiff was not entitled to recover, as the notice even if given to the company, would only be notice that the property had been alienated, which under section 41 rendered the insurance void.

Bethune, Q.C., for the appellant.

C. Robinson, Q.C., for respondent.

Appeal allowed.

From Q. B.]

Parsons v. Standard Ins. Co.

Insurance—Prior insurance.

Where an applicant for insurance in answer to the question "What other insurances, if any, and in what office," replied shewing four existing insurances of $2,000 each; but, by mistake, mentioned the name of the Canada Fire & Marine instead of the Provincial Insurance Company.

Held, reversing the judgment of the Queen's Bench, that under the 8th statutory condition, the policy was void.

After the issue of the policy the insured allowed one of the above policies to drop, and substituted another in a different company for a similar amount.

Held, that the policy was avoided by the non-communication of the insurance.

Bethune, Q.C., for the appellant.

H. Cameron, Q.C., for the respondent.

Appeal allowed.

From Q. B.]

MARRIN v. STADACONA INS. CO.

Insurance—Loss, if any, payable to third party—Cancellation – Right of insured to recover.

The plaintiffs effected an insurance with defendants; loss, if any, payable to H., as security to H., for any balance of account that might be due him.

Held, affirming the judgment of the Queen's Bench, that H., in the absence of authority, by or on behalf of the plaintiffs, had no authority to surrender the policy for cancellation.

C. Robinson, Q.C. (*H. J. Scott* with him), for the appellants.

Ferguson, Q.C., for the respondents.

Appeal dismissed.

From Chy.]

DEACON v. DRIFFIL.

Insolvency— Sale by mortgagee—Right to prove for deficiency.

The plaintiff, who was mortgagee of lands of an insolvent, obtained against the assignee the usual decree for sale, with a special direction that in case of a deficiency he should be at liberty to prove against the estate for such deficiency on such deficiency being certified by the Master.

Held, (reversing the decree of Proudfoot, V.C.) that under the Insolvent Act of 1875 the plaintiff could not prove for such deficiency.

Ferguson, Q.C., for the appellant.

W. Mulock, for the respondent.

Appeal allowed.

From Chy.]

SHAW v. CRAWFORD.

Lunatic's estate—Final order of foreclosure —Effect of—Committee—Security.

Held, affirming the judgment of Spragge C., on the authority of the cases of *Gunn* v. *Doble*, 15 Grant, 655, and *McLean* v. *Grant*, 20 Grant, 76, that a sale by a mortgagee, who has obtained a final order of foreclosure of real estate of a lunatic valid on its face, cannot be questioned by reason of some prior formal defect discovered a number of years after the sale.

The objection in this case was that the alleged committee of the lunatic's estate had acted and executed the mortgage in question without having first given security.

Held that the Act, 9 Vict. ch. 10, which provided for security being given only extended to cases where the Committee was appointed by the Master, and not as here by the Court, the Court having a discretionary power to authorize a committee to act before giving security.

Held, also that security was only against the misapplication of the personalty and the rents and profits of the realty, and was not directed against a mortgage executed under the authority of the Court.

Held also that the requirements of the statute, as to security, were only directory, and that a failure to comply therewith would not invalidate acts done by a person appointed and assuming to act as committee during a long series of years and who never disputed his appointment or liability, but on the contrary admitted both in the most unequivocal manner.

The bill in this case was filed against the representatives of one C. the purchaser, the T. & L. Co. the mortgagees, and H. the committee.

Held, under the circumstances and for the reasons fully set out in this case, that in any event the bill was properly dismissed against the T. & L. Co. and H. and that it was also properly dismissed against the representatives of C.

From Q. B.]

JOHNSTON v. WESTERN INSURANCE CO.

Fire insurance—Pleading—Condition precedent—Ascertainment of loss.

The declaration alleged that defendants covenanted that, subject to the conditions endorsed on the policy sued on, they would pay to the assured all such immediate loss or damage not exceeding $2,000 as should happen by fire during the currency of the policy, and averred generally a performance of those conditions. The defendants pleaded that one of those conditions was, that payment of such loss need not be made by the defendants until 60 days after the same should have been ascertained and proved, and that at the commencement of the ac-

tion the alleged loss had not been ascertained and proved.

Held, reversing the judgment of the Queen's Bench, that it clearly appeared from the plea, that the condition was a condition precedent, and that it was not necessary for it to point out how the loss was to be ascertained and proved.

Gordon for the appellant.

Spencer for the respondent.

Appeal allowed.

QUEEN'S BENCH.

VACATION COURT.

Hagarty, C. J.] [April 25.

Petition of Right—Contract with the Dominion before Confederation—Liability.

A petition of right set out an agreement made in 1866 between the petitioners and the Queen, represented by the Commissioner of Public Works of Canada, for the performance and completion by 1st September, 1877, of the carpenter's work required on certain additions to the Provincial Lunatic Asylum, at Toronto, and complained that, owing to the delay in proceeding with the other work which the said Commissioners promised to have done in time, they were delayed and unable to finish their work before July, 1878, and thereby put to great expense. They then alleged that their work was performed under the superintendence and control of the Commissioner of Public Works for Ontario, and for the sole benefit of and paid for by that Province, and that by an arbitration held under sec. 142 of the B. N. A. Act in 1870, the said Asylum became the property of Ontario.

Held, that the Province of Ontario was not liable.

Edgar and Cartwright for the Queen.

W. McDonald, contra.

Hagarty, C. J.] [May 23.

Boustead v. Jeffs.

Promissory note—Stamps—Pleading.

Declaration on promissory note. Plea—that note was not properly stamped, and that plaintiff, the endorsee, did not pay double duty as soon as he acquired knowledge. Replication, admitting that plaintiff had not paid duty as soon as he acquired the knowledge that it had not been paid, and alleging that it was through error or mistake that he became holder with such knowledge, and as soon as he discovered the error he paid the double duty.

Held, replication bad for not tendering proper issue.

A similar replication to the third plea held sufficient, because the plea did not allege in terms that duty had not been paid.

Semble, that plaintiff might have the protection of the statute under a traverse.

Bigelow for the demurrer.

Akers, contra.

Hagarty, C. J.] [May 2.

Re Ontario Bank and Foster.

Banking Act of 1871, s. 25—Application for order awarding shares—Writ executed in Quebec by bailiff and not by sheriff—Sale in execution in Montreal of shares of bank whose head office is in Toronto.

Upon an application by the Ontario Bank for an order under s. 25 of the Banking Act of 1871, adjudicating and awarding shares,

Held, that an execution from the Supreme Court of Montreal may be validly executed by a sworn bailiff of that Court, instead of by the Sheriff, under s. 19 of the Banking Act.

Also, that a sale in execution in Montreal may be made of shares of a bank whose head office is in Toronto.

Falconbridge, for the bank.

Holman, for the purchaser at bailiff's sale.

Osler, J.] [June 10.

Hubbard v. The Union Fire Insurance Company.

Arbitration—Presence of parties—Invalidity of award.

One H. insured his stock of teas, &c., and sustained a loss by fire. In accordance with the statutory condition, an agreement was entered into referring the ascertainment

of the total loss to L. and C., and a third person to be appointed by them if they thought fit, the appraisement and estimate by them or any two of them to be binding on the parties. L. and C. appointed M. as third arbitrator. After the closing of the evidence and several meetings by the arbitrators, M. having drawn the document set out below produced it at a meeting of the arbitrators and read it as *his* decision. This was in M's. own handwriting. At the next meeting a document formally drawn up by the Company's solicitors was produced and signed by M. but for some reason it was abandoned. At this meeting the arbitrators permitted the manager and inspector of the Company to be present and to take part in the discussion as to the amount of the award and the fixing of the costs. The next day L. and M. met and, after adding a clause reducing the amount mentioned in the document prepared by M. by $53.75, portion of a former award as to partial loss, signed the said document and published it as an award.

Held, that permitting the officers of the Company to be present and take part in the deliberations of the arbitrators was such improper conduct as to render the award invalid.

Held, also, that the said document written and signed by M. and expressed throughout in *the first person* and as his decision alone, and without any expressions therein to shew it to be the decision of L., although signed by L., could not be upheld as the award of two arbitrators.

Clendenan for application.

A. C. Galt, contra.

COMMON PLEAS.

IN BANCO.

[June 5.

Reynolds v. Corporation of Ontario.

This was a rehearing of the judgment of Cameron, J., in this case, reported in 29 C. P. 488.

The Court affirmed the judgment.

Hector Cameron, Q. C., for the plaintiff.

Robinson, Q. C., and *H. J. Scott* for the defendant.

[June 5.

Regina v. Bonter.

Criminal Law—Assault—Competency of prisoner to give evidence in his own behalf,—40 Vict., c. 18, D.

The prisoner was indicted for that he did make an assault on one R., and him the said R. did beat, wound and illtreat with a club on and about his head and other parts of his body, and thereby thus occasioned R. great actual bodily harm, so that his life was greatly despaired of.

Held, that the prisoner could not be deemed to be on his trial for a common assault only, so as under 40 Vict., c. 18, D., to make him a competent witness in his own behalf.

Wallbridge, Q. C. for the prisoner.

J. G. Scott, Q. C. for the Crown.

[June 5.

Regina v. Stitt.

Criminal law—Supplying noxious thing with intent to procure abortion—33, 34 Vict. cap. 20, sec. 60, D.

The prisoner supplied a pregnant woman with two bottles of Sir James Clarke's female pills, with instructions to take twenty-five pills at a dose, and it would procure a miscarriage, but if taken as directed in the wrapper on the bottles—namely, one pill night and morning, and increasing the dose to four pills a-day, it would have a contrary effect. It was proved that the pills contained oil of savin, and that a bottleful, consisting of from three to four dozen pills, would contain about four grains, which would probably be sufficient to procure an abortion; that oil of savin in any dose was a most dangerous thing to give to a pregnant woman, and was given in such cases to procure abortion.

Held, under the circumstances, there was a supplying of a noxious thing within the meaning of the Act, 33, 34 Vict. cap. 20, sec. 60, D., to procure an abortion.

McMichael, Q.C., for the prisoner.

J. G. Scott, Q.C., for the Crown.

[June 5.

TURCOTTE ET AL. v. DAWSON.

Foreign judgment—Action on—Appearance—Effect of fraud.

In an action on a judgment recovered in the Province of Quebec—*Held*, that an appearance entered to the action in the Quebec Court must be deemed to be equivalent to personal service, so as to preclude the defendant from entering into the merits of the original cause of action.

The defendant pleaded herein that, after the entry of such appearance, the defendant gave to the plaintiff, and the plaintiff accepted a mortgage in satisfaction and discharge of the action and of all damages and costs in respect thereof, and that afterwards the plaintiff, without any notice to, or knowledge by, defendant, contrary to good faith and in fraud of defendant, proceeded with the action and recovered the judgment now sued upon against the defendant.

Held, that this was a good plea, and the evidence in support of it should have been received.

It appeared that from this judgment one of the defendants in Quebec had appealed, and that the appeal was still pending.

Quære.—Whether during the pendency of such appeal this action would lie.

A verdict having been entered for the plaintiffs, the Court granted a new trial.

McMichael, Q.C., and *S. G. Wood*, for the plaintiffs.

Ferguson, Q.C., and *J. R. Roaf*, for the defendant.

CANADA PERMANENT LOAN AND SAVINGS CO. v. PAGE.

Mortgage—Proof of execution—R. S. O. ch. 111, sec. 56.

In ejectment, the plaintiffs, in proof of a mortgage under which plaintiffs claimed title, produced the registered duplicate original thereof with the registrar's certificate endorsed thereon—*Held* that under R. S. O. ch. 111, sec. 56, this was prima facie evidence of the due execution of such mortgage.

Beverley Jones, for the plaintiffs.

Frank J. Joseph, for the defendant.

VACATION COURT.

[June 6.

WRIGHT v. CREIGHTON.

Arbitration—Adding parties—R. S. O. ch. 49.

In ejectment the plaintiff claimed as assignee of one M. of a mortgage made to him by one C.; the defendant claimed under a deed from M. and by possession. He also set up a payment to M. of the mortgage of which he was the holder; and an offer to redeem on being notified of the amount due. At the trial the cause was, by consent, referred to an arbitrator; the order of reference providing, amongst other things, that the arbitrator should have all the powers of a judge at *nisi prius* as to adding parties. After the reference had been entered upon it was discovered that, previous to the assignment of the mortgage to the plaintiff, it had been assigned to one R., who had assigned to E. W. and J. W., the latter being the husband of the plaintiff. On consents of E. W. and J. W. being filed to have their names added as co-plaintiffs, the arbitrator, after notice to the defendant, made an order adding them as such parties. On motion to set aside the order, but without it being made to appear that the defendant was in any way prejudiced or that any injustice was done him:

Held, by OSLER J., that under the order of reference and the Administration of Justice Act, 30 Vict. c. 8, R. S. O. c. 49, the arbitrator was authorized to make the order adding the parties.

Aylesworth for the plaintiff.

B. E. Bull for the defendant.

CHANCERY.

COLVER v. SWAYZE.

Proudfoot, V. C.] [June 14.

Fraudulent conveyance—Parties—Demurrer

Although it would seem that, in this Province, every bill by a creditor against the assets of a deceased debtor, whether so expressed or not, should be taken to be on behalf of all the creditors, and that it is the duty of personal representatives, in every case where a deficiency of assets is apprehended, to ask for a general administration, and if they do not ask for it, it

would be the duty of the Court to direct it; and although there may not exist any cogent reason for requiring the bill to be in that form in this country, still the practice of the Court here having been uniform in following the English rule it would now require the decision of a higher tribunal to alter it. The same reasoning which requires that, in proceeding against a living debtor, a creditor without a lien must sue on behalf of all others applies with equal force where the suit is against the representatives of a deceased debtor.

Longeway v. *Mitchell*, 17 Gr. 190, observed upon and followed.

BOLTON v. BAILEY.

Proudfoot, V. C.] [June 14.

Will, Construction of—Gift to a class—Lapsed legacy.

A testator, after sundry bequests and devises, amongst others an estate for life in all his lands to his widow, devised the same lands to trustees upon trust, within two years after the death of his widow, to sell and dispose thereof, to execute deeds and to give receipts, &c., and "after the sale of my said real estate I give and bequeath the proceeds of such sale or sales to my nephew, G. B., son of my brother Joseph, and to the following children of my brother George (naming them) equally share and share alike, male and female, without exception, when they respectively attain the age of twenty-one, to them, their heirs and assigns; and in the event of any of my legatees dying before getting their share or portion as aforesaid leaving child or children, in such case the child or children of any so dying shall inherit the share of the deceased parent." One of the nephews died during the life-time of the widow without issue.

Held, That there was no bequest of anything until the sale had taken place; that the bequest was one of personalty, not of realty; that no interest vested in such deceased nephew, as he did not live till the time of sale; that the gift was not a gift to a class; and, there being no residuary clause in the will, that the share of such deceased nephew lapsed and passed to the next of kin of the testator, and not to the legatee of the nephew.

COMMON LAW CHAMBERS.

MASURET v. LANSDELL.

Mr. Dalton.] [May 25.

Interpleader—County Court writs—Costs.

Several executions from different County Courts having been placed in the Sheriff's hands on an interpleader application to the Superior Court. *Held*, that all costs, including those of the Sheriff, should be taxed on the County Court scale.

This was an interpleader application for the Sheriff of Norfolk. Several writs of *fi. fa.* from different County Courts had been placed in the sheriff's hands, and the present application was made in the Superior Court under R. S. O., ch. 54, sec. 12. Issues having been directed, *Smellie*, for the sheriff, asked Superior Court costs; the execution creditors and the claimant contended that all costs in the matter should be taxed on the County Court scale, although the application was made in the Superior Court, as all the writs had been issued out of County Courts.

Held, that the sheriff was entitled to County Court costs only, and that the costs of the issues directed should be taxed on the same scale.

CORCORAN v. ROBB.

Mr. Dalton.]

Libel—Plea of justification—Particulars.

In an action of libel the plaintiff alleged that the defendant had accused him in a newspaper article of having made false returns to the Government in his business of distiller. To this the defendant pleaded justification.

Held that the plaintiff was entitled to particulars of the defence intended to be set up under this plea.

BOOTH v. WALTON.

Mr. Dalton.] [June 17.

Stay of execution—Set off of judgments.

The plaintiff Booth was engaged by the

defendant to manage a cheese factory. The defendant refused to pay the plaintiff's wages, alleging that the latter had been guilty of negligence in his duties, whereby the defendant incurred loss. The present action was then brought, and the defendant pleaded the above defence by way of set off. The judge at the trial ruled that such a claim was not a subject of set-off, and his ruling was upheld by the full Court. Walton then sued Booth in the County Court for damages caused by the alleged negligence.

Watson, for Walton, obtained a summons to stay execution in the suit of Booth v. Walton until the County Court action should be disposed of, on the ground that Walton would be entitled to set off any judgment he might recover in the latter suit against Booth's judgment. The affidavit stated that Walton was a man of means, while Booth was worthless, and that unless the set-off of judgments were allowed Walton would lose the benefit of any verdict he might recover. *Alliance Bank* v. *Holford*, 16 C. B. N. S., 460, was cited in support of the summons.

Marsh showed cause, and contended that the stay should not be allowed, as Walton had not yet proved himself entitled to damages, but was proceeding on a mere doubtful claim. He had not furnished the particulars of the alleged damages, but had simply made a general allegation of merits in the action brought by him.

Mr. Dalton followed the case above cited, and directed that the summons be made absolute if it be shown that the County Court case will be brought to a hearing in a week or ten days.

CHANCERY CHAMBERS.

Re Ross.

Proudfoot, V.C.] [May 28.

Administration—Master's office—Prima facie proof of claim.

In an administration suit McM. filed a claim in the Master's office against the estate for $11,000, and produced promissory notes signed by deceased for the amount of the claim. Of the whole claim of $11,000 a portion, $284.45, was not vouched by notes. McM. offered to allow his books, etc., to be inspected at his place of business. Upon the application of the representatives of the deceased, the Master at Barrie ordered the production of the books and papers of the claimant, which required the production of books and invoices extending over a period of ten or eleven years. On appeal from the Master's order, Proudfoot, V.C., held that the order should be reversed, the claimants undertaking to permit inspection as in their own affidavit, and producing the books referring to the item of $284.45. Appellants to have costs of appeal.

Mulock for appeal.

McDonald contra.

Referee] [June 3

Powell v. Peck.

Security for costs of appeal—Bond—Execution—Stay of.

The bond for $400 given under the provisions of sec. 26, c. 38, R. S. O., is a security for the costs of appeal only; in order to tay execution for the costs of the Court below further security must be given.

Black for appellant.

Beck for respondent.

Referee] [June 6.

Proudfoot, V. C.] [June 9.

London and C. L. and A. Co. v. Thompson.

Where a bill had been filed for foreclosure and the defendant, the official assignee of the mortgagor, absconded before the bill was served, an order was granted allowing substitutional service on one of two inspectors of the insolvent's estate.

Arnoldi for applicant.

To Correspondent.—We cannot publish the letter signed 'Wellington' as the writer does not give his name and address. The matter of it is hardly worth discussing.

Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 42nd VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

William Egerton Perdue.
Elgin Schoff.
James Haverson.
John Cowan.
Ernest Henry Eden Eddis.
Edward Sydney Smith.
John Gilbert Gordon.
Joseph Alfred Wright.
Chester Glass.
Peter Vances Georgen.
James Pearson.
John Bishop.
Frederick William Barrett.
Thomas William Howard.
Daniel Bayarde Dingman.
John Inkerman MacCraken.
James Dowdall.
John Hodgins.
Reginald Gourlay.

And as special cases under 39 Vic. cap. 31 :—

John MacGregor.
William Jex.
Charles McMichael.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

Villeroi Switzer.
Henry Lincoln Rice.

Matriculants.

John Percy Lawless.
Thomas Hadzor Marshall.
Richard Henry Hubbs.
John Robertson Miller.
N. H. Beemer.

Juniors.

Stephen Frederick Washington.
William John Northwood.
John Graham Forgie.
Samuel Thomas Scilly.
Daniel Urquhart.
Levi Thompson.
Denis Joseph Mungovan.
Thomas B. Shorbotham.
Thomas Young Cain.
William Dickinson Farrell McIntosh.
John Dick Hepburn.
David Kirkpatrick J. McKinnon.
David Thorburn Symons.
James Bicknell.
Arthur Wellington Burk.
Lesslie Livingston Jackson.
Charles Creighton Ross.
Arthur Eugene Fitch.
Matthew Elliott Mitchell.
Robert Notman Ball.
George F. Cairns.
James Sidney Garvin.
Gerald Bolster.
Robert Christie.
Noble A. Bartlett.
Arthur Fred. James Spencer.
William Gilbert Macdonald.
Arthur William Johnson.

Articled Clerks.

William Henry Gordon.
Herbert Henry Bolton.
George Holmes Anderson.
Harold Victor Bray.
Edwin Duncan Cameron.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem:—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR AUGUST.

1. Frid. ..Slavery abolished in British Empire, 1834.
3. Sun. ..8th Sunday after Trinity.
5. Tues...Atlantic cable laid, 1858.
10. Sun. ..9th Sunday after Trinity.
12. Tues...Prim. Exam. Disraeli created Lord Beaconsfield, 1877.
13. Wed...Prim. Exam. Sir Peregrine Maitland, Lieutenant-Governor, 1818.
14. Thur..Primary examinations.
17. Sun. ..10th Sunday after Trinity. General Hunter, Lieutenant-Governor, 1799.
19. Tues...1st Intermediate examination.
20. Wed...2nd Intermediate examination.
21. Thur..Long Vacation, Q.B., C.P., and Co. Courts ends. Attorney's examination.
22. Fri. ...Examination for call.
24. Sun. ..11th Sunday after Trinity.
25. Mon. ..Trinity Term begins. Convocation meets.
26. Tues...Convocation meets.
28. Thur..Rehearing term in Chancery begins.
30. Sat. ..Long Vacation in Supreme Court, Court of Appeal and Chancery ends. Convocation meets.
31. Sun. ..12th Sunday after Trinity.

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Canada Law Journal.

Toronto, August, 1879.

The Lord Chief Justice of England, Sir Alexander Cockburn, has recently expressed the following opinion on the codification of the law. It is contained in a letter written by him to the Attorney-General, under date June 11th, on the subject of the proposed criminal code. The opinion of that great lawyer and accomplished scholar cannot fail to carry much weight. He writes as follows:—"I have long been, for reasons on which it is unnecessary here to dwell, a firm believer in not only the expediency and possibility, but also in the coming necessity of codification, and I have rejoiced, therefore, at the favourable reception which the proposal to codify our criminal law has received from the press as of good omen. But it would, I think, be much to be deplored if the eager desire to see the law codified, entertained by the public, of whom few have perhaps taken the trouble to study the details of the measure, and still fewer are in a position to appreciate the legal difficulties which present themselves, should lead to the adoption of a statement of the law still imperfect and incomplete. For not only would this be a misfortune as regards the work itself and administration of justice under it, but any failure in this, our first attempt at what can properly be termed a code would engender a distrust of this method of dealing with the law which would retard all further attempts at codification for an indefinite period." The letter from which the above passage is taken is to be found in the Law Journal for June 28th, ult.

Candidates for the rôle of Portia ap-

pear to be rapidly on the increase. The *Irish Law Times* for June 21st, in a passage in which our remarks apropos of Mrs. Bella Lockwood are quoted, speaks of a case of *Fogarty* v. *Howard*, which recently came before the Master of the Rolls in Ireland. Here a lady appeared in person and conducted her own suit. She found, however, according to our contemporary, that, though she assumed a statement of claim could be written as easily "as a letter," it was as difficult for her to frame a proper one, as it would be, in the words of the learned Judge, for him to plait a straw hat. She, however, it seems, escaped more easily than Mrs. Bella Lockwood. But, perhaps, would-be ladies of the Black Robe will find their most favourable field in California. Referring to the admission of Mary Josephine Young, on May 13th, to practise as attorney and counsellor-at-law in the Supreme Court of California, the *Pacific Coast Law Journal* observes: "Mrs. Young is the wife of J. N. Young, a prominent attorney at Sacramento, and she has the honour of being the first woman in this State who has obtained a license to practise law from the Supreme Court. We are informed that she passed an exceedingly satisfactory examination, and is worthily entitled to the honours thus placed upon her, without partiality or undue gallantry. The problematic question of the success of female practitioners, it seems, will soon be practically settled." Although Pericles, who, in his Funeral Speech, tells the widows of the Athenians that "great is the glory of that woman who is least spoken of among men, either for good or for ill," would scarcely have approved of the admittance of women to practise in the Law Courts, yet it is, perhaps, hard to maintain that the fair sex would be out of place in the Temple of Justice.

SIR JOHN MELLOR'S FAREWELL.

The retirement of Mr. Justice Mellor was the occasion of an interesting ceremony in the English Court of Queen's Bench on June 11th ult., when he took his leave of the bar. We read that, as the time appointed approached, the Court became extremely crowded. The front row was occupied by the leaders of the different circuits, while every corner of the court was filled by those barristers and others who could not obtain seats. All the judges were present, and the galleries were filled with the private friends of the retiring judge.

At about a quarter to four the Attorney-General, the Solicitor-General, and Sir Henry James entered the Court, and took their places, and after a pause of a few moments, the Attorney-General rose and addressed the bench in these terms: "My Lord, before the Court rises for the day, I desire to ask permission to address, on behalf of the bar, a few words to Mr. Justice Mellor." The Attorney-General then—the whole of the bar rising as a token of respect—delivered an eloquent farewell address to the learned judge. We have only space to quote his concluding remarks, in which he expressed the high appreciation which the bar had of the manner in which Sir John Mellor had discharged his judicial functions. They were as follows:—

"My Lord, in the judgment of those for whom I speak, you have set a pattern to the judges who have been your contemporaries, and to the judges who will sit in our Courts after you have gone from them, of the manner in which justice ought to be administered. In dealing with legal questions you have shown that you have sought the sources of the law, and have mastered the great principles upon which our laws are founded, and you have ever been anxious to base your decisions upon such principles, disregarding technicalities and

ingenious refinements whenever they seemed calculated to lead your mind astray from the broad track of common sense; while in the investigation of questions of fact, you have displayed the acumen of a vigorous intelligence, combined with the most admirable and praiseworthy patience. My Lord, in the performance of your duties as a judge, not only have you exhibited learning, industry and ability, not only have you shown yourself perfectly impartial and fearlessly independent, but you have in a marked and extraordinary degree proved yourself the possessor of other qualities, without which no man, however vast may be his talents, however powerful his intellect, can ever be pronounced a perfect judge. I allude, my lord, to your kindliness of heart, and to the thorough generosity of your disposition. My Lord, during the long period of your judicial career you have invariably treated the bar, not with courtesy merely, for courtesy we have a right to expect, but with a generous kindness and a delicate consideration which was more than our due, and which at times might perhaps, without injustice, have been withheld. My Lord, the members of the bar have always felt it a delight to practise before you, and they will ever remember with feelings of gratitude the manner in which you have treated them. And now I must cease to trouble you. I have no doubt that, while you are in the enjoyment of the leisure you have so fully earned and so richly deserved, many reflections will occur which will afford you satisfaction. I hope that not the least pleasurable will be the consciousness that during your judicial life you have won for yourself the esteem, the admiration, and the affection of the bar of England."

Mr. Justice Mellor, who appeared deeply affected, then replied. After remarking that when he was first appointed a member of that Court, it was associated with all its great traditions, and was presided over by the present Lord Chief Justice, "whese brilliant abilities have only been rendered more conspicuous by time,"—he proceeded to express his sense of the kindness he had received from his colleagues, and the assistance he had invariably received from the bar. He, then, continued as follows:—

"I may now say, in the presence of the bar and of all my dear friends who are around me, that the kindness I have received from every member of the judicial bench—in whatever Court—has been to me the greatest happiness, and the most pleasant assurance to me that I was not unacceptable to them. Our intercourse was not the mere formal intercourse which must take place between men in such a position, but it was kindly, friendly, uninterrupted by a single day.....In such circumstances I cannot but feel regret in being obliged to retire from association with them; but circumstances have compelled me to the conclusion that I am following the dictates of prudence, as well as serving the interests of the public in making way for another man. Mr. Attorney-General, I shall ever look back on this day with pleasure, and its memory will always be a well-spring of delight and satisfaction. I thank you for the assurance you have given me on the part of the bar; and I shall look to the future of the bar with the deepest interest, assured as I am that, so long as the functions of the bar are honourably performed, they will afford the best security for the liberties of the people."

He then, after again expressing his gratification at the remarks of the Attorney-General, bade "Farewell." The judges present then took their leave of the retiring judge, who with his colleagues, left the Court.

The English *Law Journal* of June 14th ult., whose account of the ceremony we have abridged, thus expresses itself as to Mr. Justice Mellor's career:—

"His Lordship's career was not marked by those brilliant flashes of intellectual power which have won for some of his contemporaries the admiration of the public; nor could he be regarded as a judge of great learning or great authority. But he was very assiduous, very patient and painstaking, a man of excellent good sense, a lover

of fair dealing, anxious to do right, free from passion and prejudice, and peculiarly courteous to his brethren on the bench and to the bar. By these qualities he won universal good-will, and hence it was that the leave-taking of Wednesday last was marked by signs of sincerity on all sides."

SELECTIONS.

O'Brien's Division Court Manual (2nd Edition). Willing & Williamson, Toronto, 1879.

This is a second edition of a very useful book published some ten years ago by Mr. Henry O'Brien, Barrister-at-law, on the practice of Division Courts, and which has been received as the authoritative text book on the subject ever since. The present volume is double the size of the previous one, and the Acts and rules are much more fully annotated. We notice, for example, that some three hundred additional cases have been examined and referred to by the author. A careful examination of the work enables us to say that it will not fall short of the high expectations raised concerning it. The editor has done his work well and carefully; we are glad to see that he has not unnecessarily clogged it with cases, citing the latest authorities, and those which directly bear upon the points in question. This course saves readers from the not uncommon task imposed upon them by legal authors of having to examine for themselves a number of cases, many of which do not apply, and so, by a process of elimination, to arrive at what the law on the subject really is—a duty which ought to be performed by the author. On a comparison of the two editions, we find in the last several new Acts treated of which had no existence on the statute book when the first edition came out. The principal one of these is the law of the garnishment of debts; and when we look back at the doubt and uncertainty that prevailed on the subject, when the Act first came out, some ten years ago, we are sure the profession, and those having business in the local courts, will feel thankful to find that great light has been thrown on so many doubtful points, and the practice in this branch made comparatively plain.

The law of replevin, as applied to the Division Courts, and the clauses allowing judgment to be entered by default, are also carefully treated and annotated. The Replevin Act is given in full, as well as a number of other Acts and parts of Acts which impose duties on Division Court clerks. It will be observed that the subject of *jurisdiction*—one of the most, if not the most, important in the book—is treated of at great length with evident care and circumspection, and with a very successful attempt to elucidate and reconcile the many apparently conflicting cases on the subject. The questions of prohibition, mandamus, and certiorari are treated of in a separate chapter—(a very good idea, as they are seldom approached by clerks or the general practitioner)—and are evidently handled by one quite familiar with his subject. The marginal notes will be found very useful as a means of ready reference. We feel confident that Mr. O'Brien's work will be hailed with satisfaction by clerks and other officers of Division Courts, and no less by those who either practise or do business in those courts. We see by the preface that Mr. O'Brien has been assisted in his labours by Judge Gowan and others of the most experienced of the County Court Judges, a fact which will lend large additional value to the work.—*Toronto Mail.*

The acknowledged usefulness and popularity of the first edition of this work have done much towards securing a favourable reception for the present edition. Those who are familiar with the earlier edition only, can scarcely estimate the wide scope of the present volume and the extended field covered by it. Since 1866, when the first edition was issued, much legislation has taken place in reference to Division Courts, and their jurisdiction has been very much enlarged, especially by the powers given them of garnishing debts. All the various enactments relating to these Courts were consolidated in chapter 47 of the Revised Statutes, which Mr. O'Brien has taken as the basis of the present work.

There is a careful annotation of almost every provision of the Act referred to, also of the Replevin Act, the Fence Viewers and Watercourses Act, and the Acts respecting Education and Public Schools, in so far as they relate to the jurisdiction of Division Courts. An annotated list is given of the rules of the Courts as recast and supplemented by the Board of County Court Judges. The chapter on *prohibition*, *certiorari*, and *mandamus*, in which the English and Canadian decisions are embodied, will prove most useful to the legal profession. A new and complete schedule of forms has been added, which contributes much to the value of the work. The index, usually a weak feature in Canadian law books, is excellent in all particulars. The volume, in fact, supplies a place that has long been felt, and it will prove of great assistance to Division Court clerks and practitioners. The work throughout reflects great credit upon the author, whose learning and wide experience have specially fitted him for the task he has undertaken. The volume is very neatly printed, and the publishers have spared no pains to render its appearance as attractive as possible.—*Toronto Globe.*

(The above have been selected from various notices of the second edition of Mr. Henry O'Brien's *Division Courts Manual*, which was published about the beginning of last month).

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO.

[June 28.

Muttlebury v. King

Mortgage—Plan—Registration.

M. was owner of the east half of a certain lot of land. In 1872, he employed one S. to draw a plan of a portion of this half-lot, comprising the Village of Moorfield, upon which plan some lots were numbered and others lettered. The land in question was marked on the plan as "The Parsonage Lot," but was neither numbered nor lettered. The plan so marked was never registered. In 1874, M. applied to B., one of the defendants, for a loan of $12,000 on the said half-lot, "reserving thereout lots numbered from 1 to 181, both inclusive, as shewn on a plan made by S. and dated 1872," and during negotiations for the loan M. left a lithographed copy of the plan in B.'s possession, but took no steps to register it. Subsequently, M. altered his plan by running a street through lots 106 to 115, and transferred the number 106 to the Parsonage Lot. The date of the plan remained as 1872, and M. then registered it in its altered state. In 1876, M. applied to the plaintiff for a loan of $600 upon "Lot 106, or the Parsonage Lot." An abstract was obtained by the plaintiff from the Registrar of the North Riding of Wellington, from which abstract the prior mortgage from M. to B. was omitted, the registrar considering that inasmuch as lots 1 to 108 inclusive were excepted from B.'s mortgage, the property in question was not affected by it. A mortgage was then made by M. to the plaintiff. In ejectment by the plaintiff against B.:

Held, That the plaintiff's title must fail. (1) That no obligation was cast upon B. under the Registry Laws, or otherwise, to register the plan, which was only referred to in describing the reservations from his mortgage.

(2) That B.'s title was complete by registration of his mortgage on the Township Lot.

(3) And that if, from any cause, the exception or reservation from the property mentioned in B.'s mortgage proved abortive or ineffectual, B. was entitled to the excepted portion also.

C. Robinson, Q.C. and *A. C. Galt*, for plaintiff.

J. K. Kerr, Q.C., *contra.*

Ohlemacher v. Brown.

Foreign judgment—Foreign discharge in bankruptcy—Evidence.

Plaintiff sued on a foreign judgment rendered against defendant. Defendant pleaded

never indebted and never served with proceedings in foreign court. During the progress of this suit defendant obtained a discharge in bankruptcy in the District Court for the Northern District of Ohio, and at the trial obtained leave to plead the foreign discharge as a plea of *puis darrein continuance*. Defendant proved that such a discharge would release defendant of all his debts (proveable against his estate) in the United States, including the debt to plaintiff. Plaintiff's only evidence in reply was that defendant resided in Canada for two years previous to the discharge, and that he (plaintiff) had no notice of the defendant's bankruptcy in the United States, and he contended that, as the Bankruptcy Act required the bankrupt to reside, or carry on business in the State where he filed his petition, and as defendant resided in Canada, the Court in Ohio had no jurisdiction to grant a discharge, and that the one produced was therefore bad. *Held*, that the discharge in bankruptcy produced was a bar to plaintiff's action. *Held*, also, that it was not necessary for defendant to prove that all proper steps were taken to obtain the discharge, but that the discharge *prima facie* proved that every step before the discharge had been regularly taken.

J. B. Clarke, for plaintiff.

Caswell, contra.

Hayes v. Union Mutual Life Assurance Company.

Insurance—Misstatement as to age of insured—Burden of proof—Voluntary admissions separable from others.

One H. had an insurance on his life and died. The plaintiff, his administratrix, in the proofs of death, misstated the age of the insured, which misstatement, if true, would have avoided the policy. In an action on the policy defendants pleaded misrepresentation as to age of insured, and at the trial plaintiff swore that she had no grounds for making this misstatement, except that she had been misled into making it by entries in an old book in the insured's possession at the time of his death.

Held, that she was not bound by this misstatement, but could, on her own evidence, explain it away, and that the burden of proof was not so shifted as to compel her to shew the true age of the insured to be as stated in the application, but that defendants were bound to prove the misrepresentation. *Held*, also, that the conditions of the policy not requiring any proofs of age at the time of death, the plaintiff's admission as to age being voluntarily made, could be separated from the other statements in the proofs which were required by the conditions, and that defendants were not entitled to have all the statements in the proofs treated as one admission.

Bethune, Q.C., for plaintiff.

W. Mulock, contra.

Barnes v. Bellamy.

Landlord and tenant—Eviction by title paramount.

Prior to the lease of the premises for the rent of which this action was brought, the plaintiff's predecessor in title had mortgaged the same, and the assignee of the mortgagee brought ejectment against defendant, the tenant of the premises, who thereupon gave up possession. *Held*, that this amounted to an eviction, and that plaintiff could only recover the rent up to the date of the writ, which must be looked upon as the date of the eviction.

Osler, Q. C., for plaintiff.

F. B. Robertson, contra.

Bellamy v. Barnes.

Lease—Covenant for quiet enjoyment—Ejectment by title paramount.

Defendant having executed a lease of certain premises to plaintiff, containing the ordinary statutory covenant for quiet enjoyment, plaintiff was subsequently ejected by the assignee of mortgages thereon created prior to the lease, and thereupon brought an action against defendant for breach of the covenant in question; but, *Held*, that he could not recover, as the assignee of the mortgages was not a person "claiming by, from or under" defendant, but by from and under the defendant's predecessor in title.

F. B. Robertson, for plaintiff.

Osler, Q. C., *contra.*

Coleman et al. v. Moore et al.

Trust deed in favour of Church—Provision for appointment of new trustees—Ejectment—Misjoinder—Right of surviving trustee to recover. R. S. O., ch. 216.

Land was conveyed to the plaintiff Coleman and four others, as 'the trustees of the congregation of the Independent Methodist Episcopal Church," with a provision, in case of death or ceasing to be a member of the said church, for the appointment of a successor or successors. The congregation acting under the directions of what was called the "Book of Discipline," which provided for an annual election of trustees, elected annually trustees for the property in question, and at one of these elections among others elected the plaintiffs. One of the original trustees under the deed died, and all the others, except the plaintiff Coleman, ceased to be members of the Church. Subsequently, three of the defendants accepted a lease of the property from Coleman. In ejectment, *Held*, that the co-plaintiffs of Coleman had been improperly joined in the action, for that having been elected trustees under the "Book of Discipline" and not under the provisions of the trust deed in place of trustees dying or ceasing to be members of the church, they were illegally elected and never became trustees, and their names were therefore ordered to be struck out of the record. *Held*, also, that Coleman was entitled to recover against the defendants, who entered under the lease from him, as they could not deny his title, and there was sufficient evidence of a disclaimer on their part, so as to dispense with a notice to quit. *Held*, also, that if the deed did not create the grantees, by virtue of R. S. O. ch. 216, a corporation, and they were to be regarded merely as natural persons, the legal estate was in Coleman and the other three surviving grantees under the deed, and Coleman was entitled to recover an undivided fourth part of the land; but that if the grantees were created a corporation, then the legal estate was in the corporation or in the trustees in a corporate capacity, and Coleman was the only corporator, the other four having either died or ceased to be corporators by reason of their having ceased to be members of the Church.

Objection having been made on the argument for the first time, that the action should have been brought in the corporate name, or at any rate under the designation in the deed, the court allowed the record to be amended in this respect and discharged the rule to set aside the plaintiff's verdict.

Irving, Q. C., for plaintiffs.

Bethune, Q. C., *contra*.

Robinet v. Pickering.

Dower—Report of Commissioners binding. R. S. O. ch. 55.

The husband of demandant, being possessed of the land in question, a 100 acre lot, conveyed it to S., 20 acres being at the time cleared. After alienation, some 70 acres more were cleared by the purchaser and his assigns. Defendant having admitted demandant's claim, the sheriff appointed commissioners who awarded demandant 7 acres of the cleared and 4 of the uncleared land. The land in question and in the neighbourhood had greatly increased in value, by reason of clearing, fencing, and buildings erected upon it, but no portion of the buildings was awarded to demandant. It appeared that the commissioners had considered the clearing of land a permanent improvement under sec. 35, subs. 3, ch. 55, R. S. O., but that they did not award any portion of the land cleared by the purchaser to demandant. *Held*, that the report of the commissioners was binding, as it was right on its face, and as it did not state how they had arrived at their award, the question of permanent improvements could not be discussed, and the court refused to refer the matter back, or to make any inquiry of the commissioners.

McMichael, Q. C., *& C. McMichael*, for plaintiff.

Fleming, contra.

Regina v. Clarke.

Conviction for selling liquor without license—Appeal to judge without jury instead of sessions. R. S. O. ch. 75, & ch. 181, secs. 51, 71. 40 Vic. ch. 27, D.

Defendant was convicted for selling li-

quor without license under R. S. O., ch. 181, s. 51, and appealed to the Sessions, which dismissed the appeal on the ground that under sec. 71, it should have been made to the county judge in chambers, without a jury. *Held*, refusing an application for a mandamus to compel the Sessions to try appeal, on the ground that sec. 71, of R. S. O., ch. 181, was *ultra vires* the Ontario legislature, that R. S. O. ch. 75 and ch. 181, sec. 71, constituted the County Judge, sitting in chambers without a jury, a Court of Appeal in such cases, within the meaning of 40 Vic. ch. 27, D.

Blackstock, for the applicant.
Fenton, contra.

Burnham v. Hall, Sheriff.

Action for not arresting under attachment—Tender by Sheriff under attachment—Pleading.

Held, that an action lies against a sheriff for not arresting an attorney against whom an attachment has issued for not handing over, pursuant to order, all deeds, books, papers, &c., in his custody belonging to plaintiff; and that a plea, which stated that on delivery of the attachment to defendant, the attorney delivered to him all deeds, &c., to be by defendant delivered to plaintiff, in pursuance of the order for contempt on which the attachment issued, and that long before the return day, defendant tendered them to plaintiff's attorney who refused to accept them, and that defendant was at all times ready to deliver them to plaintiff, was bad; for that, besides being hardly an answer to one of the counts of the declaration, which was for falsely returning that the attorney could not be found, a statement that the attorney delivered to defendant all deeds, &c., in his custody, might be true as to those then in his hands, and yet not as to all within the scope of the order and attachment; but that plaintiff was entitled to have the body in Court and to get discovery of all deeds, &c.

H. Cameron, Q. C., for plaintiff.
C. Robinson, Q. C., *contra*

McDonald v. McDonald et al.

Deed—Delivery—Purchase for value without notice—Registry laws.

One M. prepared a deed of the land in question, professing to be executed in plaintiff's favour, and delivered by him and requested one C. to witness his execution of it, which C. did. He then sent for one V. and procured C. to swear to the affidavit of execution before V. in the usual form for registry. Subsequently, in a moment of anger, M. tore up the deed, the pieces of which plaintiff subsequently collected and stitched together.

Held, that the deed was executed and delivered, so as to vest the land in plaintiff.

After tearing up the deed, M. willed one half of the land to his nephew, and the remaining half to others, and the nephew conveyed the whole lot to a purchaser for value, without notice, both will and deed to this purchaser being registered before the plaintiff's deed. *Held*, that the registration of the will and of the conveyance, prevailed over plaintiff's unregistered deed, as to the moiety conveyed by the nephew; but that plaintiff's deed having been subsequently registered and no conveyance appearing to have been executed or registered of the other moiety devised, plaintiff was entitled to hold this moiety under the deed from M.

H. J. Scott, for plaintiff.
Ferguson, Q. C., *contra.*

The Corporation of Chatham v. Corporation of Sombra.

Drainage Works—R. S. O. ch. 174, ss. 535, 539, 540.

Where drainage works have been proceeded with under R. S. O., ch. 174, sec. 535, *et seq.*, report made, appealed from and arbitration held, the township to be benefitted must pass a by-law under sec. 250, to raise the sum awarded against them, and cannot refuse payment until the work is completed.

There is no remedy provided by the Act for the case of improperly or insufficiently executed drainage work.

McMichael, Q. C., for plaintiffs.
Falconbridge, *contra.*

Hewitt v. Ontario Copper Lightning Rod Company.

Master and servant—Enticing servant to desert employment—Measure of damages.

Plaintiff sued defendants for enticing and procuring certain servants of plaintiff to desert his service. The evidence at the trial established that the parties in question were in plaintiff's service, and with the exception of one of them that they were induced by defendant's manager to leave the same: *Held*, following *Lumley* v. *Gye*, 2 E. & B., 216, that plaintiff was entitled to recover, and that the measure of damages was not confined to the loss of services, but that they were justified in giving ample compensation for all damages resulting from the wrongful act.

Plaintiff while objecting to one of the parties going, said he did not know that he would trouble him if he did leave, but he did not consent to his so doing. *Held*, that this did not in law amount to a permission to leave his service.

Hardy, Q. C., for plaintiff.
Osler, Q. C., *contra*.

In Re Thomas Haisley and Margaret Lundy and others, executrix and executors of Wm. Lundy.

Landlord and Tenant—Covenant to pay for building — Construction of — Assignee of chose in action. R. S. O., ch. 116, s. 7.

Lessor covenanted with lessee that he would at the expiration of the term, pay said lessee, his heirs or assigns, a valuation for his buildings on the land demised; *Held*, Cameron, J., dissenting, that the covenant was neither wholly spent in the event of destruction by fire of the building then in existence, nor necessarily limited to the then value of the existing building, but that the increased value at the expiration of the term could be claimed against the landlord.

Held, also, affirming the judgment of Wilson, C. J., that the assignee of the term, and of all claims under the covenants in the lease, could sue in his own name the covenantor's executors, under R. S. O., ch. 116, sec. 7, as the assignee of a chose in action.

Bethune, Q. C., and *Dixon* for plaintiff.
Robinson, Q.C., *contra*.

Moore v. Kuntz.

Action for goods bargained and sold—Period of credit not expired.

An action for goods bargained and sold cannot be brought until the period of credit has expired.

Osler, Q.C., and *Bowlby*, for plaintiff.
Durand, *contra*.

Hagarty v. Great Wes. Railway Co.

Action for false imprisonment—Reasonable and probable cause.

A spike having been found driven in between the rails on defendants' line of railway, plaintiff was suspected of being the guilty party, and was accordingly arrested. The evidence against him was that he had been seen, on the day the act was believed to have been committed, lounging about the railway bridge and track, early in the afternoon, for two or three hours, and that one of his boots corresponded with the footmarks about the place. The plaintiff having been acquitted, brought an action against the defendants, and the jury having found in his favour and awarded him damages, the court considering the insufficient nature of the evidence against him, declined to interfere with their verdict.

Bethune, Q. C., for plaintiff.
Irving, Q. C., *contra*.

Picken v. Victoria Railway Company.

Interpleader — Attaching orders — Adverse claims.

In an action brought by an assignee in insolvency on an undisputed claim due insolvent, defendants applied for interpleader as between the assignee and several creditors of insolvent, who had taken garnishment proceedings anterior to the insolvency.

Held, that defendants should have had these proceedings disposed of in the courts in which they originated, instead of making this application, which was therefore refused.

Aylesworth, for plaintiff.
Mulock, *Ritchie*, *Holman and Bull*, contra.

Donaldson v. Smith.

Sale of goods—Implied warranty of title.

R., a merchant at M., having obtained advances from a bank there on a quantity of brandy held by him, employed H., a broker in T., to procure advances for him on the same brandy, in order to enable him to pay off the bank. Application was made to the defendant, and after defendant had had the brandy tested by three merchants, of whom L., of the firm of L. & C., was one, he made advances upon, or rather indorsed R.'s paper to a certain extent on account of it. In order that the brandy might be tested it was sent to T., and, when the bank had been satisfied, the brandy was stored in defendant's name. Before the advance, R. & H., and, after the advance, defendant attempted to sell the brandy, which was finally disposed of to L. & C., who afterwards went into insolvency, plaintiff becoming their assignee.

L. & C. insisted that they bought the brandy from the defendant, claiming, as owners, the right to sell it. It was afterwards seized and confiscated for non-payment of duties.

L. & C. were compelled to give up the brandy in their possession, and to refund the moneys they had received from other parties to whom they had sold portions of it.

Plaintiff, as assignee of L. & C., sued the defendant on the implied warranty of title, and defendant denied that he ever sold as owner, contending that his true position as pledgee was well known to L. & C., as also H., and that H., and not he, negotiated the sale.

On this point the evidence was very contradictory, H. having made out and delivered bought and sold notes, as between R. and L. & C., as also an invoice between the same parties after the quantity of brandy had been determined, and he received a commission from R. on the sale.

Defendant, who had received a commission for indorsing R.'s paper, also received from him a commission for guaranteeing and indorsing L. & C.'s paper.

Defendant collected the money as it became due, retired the notes of R. indorsed by himself as they matured, and remitted the balance, after deducting his commission, to R.

There was no express warranty of title.

Held, that a sale by a person professing to be the owner, and being able to transfer possession, was an implied warranty of title.

Held, also, Armour, J., dissenting, that in this case the true position of defendant was known to all parties; that L. & C. knew that the brandy belonged to R., and that defendant only had it in pledge, and that therefore they did not buy it on the warranty or on the faith of defendant's being the owner; that they knew what title defendant had, and that in fact he had all the title he professed to have; and that his negotiating the sale, if he did so, as alleged, did not, with the knowledge L. & C. had of his true position, involve a warranty of title in himself or a representation of ownership.

Per Armour, J.—The verbal evidence shewed that defendant had claimed and asserted absolute ownership, and was therefore liable for a breach of warranty of title, and if L. & C. knew his true position, what he did was a warranty of title to them whether he was owner or not.

Masson v. Robertson et al.

Award under railway act—Action on bond for purchase money—Evidence—Notice of award—Adding plea.

A railway requiring the immediate possession of plaintiff's land, defendants gave their bond to the plaintiff for the purchase money thereof, conditioned to be void upon payment or deposit in Court, under the provisions of the Railway Act, of the amount of the purchase money to be ascertained by arbitration proceedings then pending under said Act, within one month from the making of the award.

Held.—(1) That an award having in fact been made, its merits could not be tried in an action upon the bond.

(2) That the award was not necessarily vitiated by reason of the arbitrators having allowed compensation for increased risk of loss by fire.

(3.) That in such an action the defendants could not examine one of the arbitra-

tors to show of what items the amount of the award was composed.

(4.) That it is not necessary before bringing such an action that a month should elapse after a written notice from one of the arbitrators to the defendants, of the making of the award, as sub-sec. 19, sec. 20, cap. 165, R. S. O. applies merely to the right of appeal from the award.

No suggestion being made as to any defect in title, and the plaintiff's counsel offering at once to deliver a conveyance of the lands to the company, the Court refused to allow a plea to be added, denying a tender of conveyance before action.

Marsh, for plaintiff.

H. Cameron, Q.C., *contra*.

Graham v. Crozier.

Libel—Privileged communication.

Defendant wrote to R. who was M.P. for the county in which the parties resided, requesting him to have plaintiff, a postmaster, removed from office, as his "roguery" was unbearable in the locality, and stating that he (defendant) could not trust his bank-book through the Post Office lest plaintiff should go to the bank and draw or keep the money: that he had sent a declaration to the Post Office Department at Ottawa to have him removed; and demanding to know what the country would "turn to" if the government kept such men in office; and that if people could not send their money through the Post Office, they had better rise in rebellion at once. Defendant then wound up his letter with a demand upon R., as their representative, to have the "scoundrel" removed: that he had broken up seven or eight money-letters and used the money for his own purpose.

Held, that the judge at the trial had rightly ruled that the occasion of writing the letter was not privileged; and that, on the authority of *Frier* v *Kinnersley*, 15 C. B. N. S. 430, the violence of the language excluded it from the rule of privileged communications.

J. K. Kerr, Q.C., for plaintiff.

McMichael, Q.C., *contra*.

COMMON PLEAS.

IN BANCO.

[June 27.

Ontario Lightning Rod Company v. Hewitt.

Libel—Damages.

In an action of libel, the libels complained of were contained in certain publications issued by the defendant, which stated that the plaintiffs, who were manufacturers of lightning rods, were charging therefor from 37 cents to 42½ cents per foot, whereas the defendant could furnish the same, and even better, from 7 cents to 10 cents per foot, and that, in so doing, the defendant, who had a thorough knowledge of the lightning rod business, felt it to be an imposition practised on the public; and the declaration averred that, in consequence of the alleged libels, the plaintiffs were greatly injured in their credit and reputation as a trading and manufacturing company, and lost many customers, and were otherwise greatly injured in their business. It appeared that the plaintiffs, for the prices charged, not only furnished the rods, but put them up, while the evidence shewed, and the jury expressly found that the statement made by the defendant, and intended to convey the impression that for the prices stated by him, he could furnish the article in the same manner as the plaintiffs, was untrue, and was made with the intent to injure the plaintiffs in their business.

Held, that the action was maintainable.

In this case the jury found the damages sustained by said plaintiffs were $4,000.

Held, that the damages were excessive, and a new trial was ordered, unless the plaintiffs consented to reduce the damages to $1,000.

McCarthy, Q. C., and *Osler*, Q. C., for the plaintiffs.

Robinson, Q. C., and *Wilkes* (Brantford), for the defendant.

O'Neil v. Ottawa Agricultural Insurance Company.

Insurance—Title—Ownership—Incumbrances—Distance of buildings—Number of stoves.

To an action on a policy of insurance the

defendants set up that, in the application for insurance, the insured, in answer to the question in the application, did he own the land in his own right, or if not, who did, said "Yes, in fee simple." It appeared that he had a deed in fee simple for the land, but had not at the time paid the price thereof.

Held, that the answer was not untrue.

A further defence set up was that, contrary to a condition of the policy, when the insured's interest in the property was other than the entire unconditional and sole ownership thereof for his use and benefit, it must be so represented to the company in the application, otherwise the policy would be void, and it was alleged that other persons were jointly interested in the property, and that he did not declare the same, whereby the policy was void. In the application the insured was not asked to state the above facts, although in the application the insured consented to be bound by the conditions of the policy.

Held, that to allow defendants to set up this defence would be a fraud on the plaintiff, and plaintiff was allowed to reply fraud, unless the defendants consented to have the plea struck out from the record.

A further defence set up was that by one of the conditions of the policy, if the insured's interest in the property should be changed in any manner, whether by act of the parties or by operation of law, the policy should be void, and that after the issuing of the policy the insured mortgaged the property, whereby the insured's interest became changed, and the policy thereby avoided.

Held, that this plea, which was proved, constituted a good defence.

The defendants also set up the omission to state on diagram the existence of two buildings within 500 feet of insured premises.

Held, that the diagram was part of the application which was required to be true, and the omission therefore constituted a good defence.

Held, also, that the statement in the diagram of a building being 190 feet, instead of 178 feet, was so slight a difference as to be immaterial, and the jury having found in plaintiff's favour, the Court would not interfere.

Held, also, that an untrue answer in the application as to the number of stoves in the insured premises, namely, that there was only one, whereas there were two, avoided the policy.

The policy in this case was issued on 2nd May, 1876, being before the coming into force of the Fire Policy Act of 1876. *Held*, that the policy did not come within the Act; and that even if it was after the Lieutenant-Governor's proclamation provided for by the Act of 1875, (but of this there was no evidence), it would only enable the Court to say what conditions were just and reasonable.

McCarthy, Q. C., for the plaintiff.
W. Mulock, for the defendants.

Page v. Austin.

Sci. fa.—Transfer of stock as collateral security—Necessity for entries on books of company.

This was an action of *sci. fa.* by plaintiff, a judgment creditor of the Ontario Wood Pavement Company, incorporated under 27 & 28 Vict. ch. 23, where an execution against them had been returned *nulla bona*, against the defendant as a shareholder of the company on his unpaid stock. It appeared that one A., who had subscribed for stock in the company, transferred the stock to defendant as collateral security for a debt which A. owed him, but the deed of transfer was on its face absolute, and there was nothing in the books of the company to shew it was otherwise.

Held, that defendant was liable; that the fact of defendant not being the absolute owner should have appeared on the books of the company.

Bethune, Q. C., and *Osler* for the plaintiff.
Maclennan, Q. C., for the defendant.

Anderson et al. v. Matthews.

Negligence — New trial for smallness of damages.

Action against defendant by plaintiffs, husband and wife, for damages sustained by them by the upsetting of a buggy, in which the plaintiffs were driving, by reason

of its coming in contact with a large stone, negligently left by the defendant on the public highway. In the first two counts of the declaration, the female plaintiff claimed damages for personal injuries sustained by her, and in the last two counts the husband sued for the loss of the comfort and services of his wife, expenses incurred in nursing and attendance, and for injuries to the horse and buggy. The evidence shewed that the wife was very seriously injured, and that the buggy was injured to the amount of $30.00, and that he incurred the losses and expenses set out in the declaration. The jury found the following verdict :—Verdict for plaintiffs on 1st and 2nd counts, with $130 damages. No damages on the last two counts.

The Court refused to grant a new trial alone for the smallness of damages on the first two counts, but being of opinion that there must be a new trial on the last two counts, as the husband was clearly entitled to damages thereunder, and as no additional expense would thereby be incurred, the new trial was granted on the whole case.

H. J. Scott for the plaintiff.

McCarthy, Q. C., for the defendant.

Fitch v. McCrimmon et al.

Partnership and individual debts—Appropriation of payments.

The defendants, McC. & McL. had been partners, and had purchased goods from the plaintiff to the amount of $442.85 ; afterwards they dissolved partnership, the defendant McC. continuing the business and taking over the assets, which included a considerable portion of the said goods. He made further purchases from the plaintiff, and from time to time paid him sums of money, and the question was as to the appropriation of these payments. The defendant McL. contended that they should be applied in payment of the balance due on the partnership debt, and the plaintiff to McC.'s individual debt. The jury found a verdict for the defendant.

A new trial was granted to enable the defendant, McL., to explain the transaction between McC. and himself, McC. having stated that McL. expressly agreed to assume the payment of the debt now sued for.

J. A. Paterson for the plaintiff.

Hector Cameron, Q. C., for the defendants.

Huntsman v. Lynd.

Ejectment—Patent from the Crown—General and particular description—Falsa demonstratio.

Ejectment to recover a piece of land claimed by the plaintiff as part of the south half of lot 23, in the 10th concession of the Township of Clinton, as being included in the patent from the Crown of this lot. The defendant claimed that this portion had never been so granted, but was ungranted land lying between the western boundary of lot 23 and the township line. According to the plans in the Crown Lands Department, and other evidence produced, lot 23 appeared to extend to the township line, and there was no evidence of any work on the ground inconsistent therewith ; it also appeared that the Government had never made any claim to this land as ungranted land, but had always assumed it to have been included in the patent of lot 23. In the patent there was a general grant of the lot as lot 23, and also by metes and bounds.

Held, that the general grant, which would accord with the plans, &c., must govern, and that the particular description, which was inconsistent therewith, must be rejected as *falsa demonstratio*.

McClive for the plaintiff.

Bethune, Q. C., for the defendant.

Crandell qui tam v. Nott.

Qui tam action—Verdict against evidence—New trial—Property qualification—Reception of evidence—Misdirection.

In a *qui tam* action against defendant for acting as a justice of the peace without sufficient property qualification, where the jury find in favour of the defendant, a new trial will not be granted because the verdict is against the weight of evidence.

In a *rule nisi* for a new trial for the reception of improper evidence, it is not sufficient merely to state that improper evidence has been received, but the evidence ob-

jected to must be specified. In this case, however, no such objection appeared to have been taken at the trial.

The defendant was called as a witness, and gave evidence as to the value of the property, and the learned judge, in charging the jury, told them, in referring thereto, that the owner of property was generally the best judge of its value.

Held, no misdirection.

The defendant had deeded certain property to his wife, but of which he claimed to be in reality the owner, and to have always had possession, and to have been assessed therefor, and in receipt of the rents and profits, and that it had only been granted to the wife for a purpose; but there was no declaration of trust in favour of the husband.

Semble, that the defendant could not qualify thereon.

It was objected that certain other property on which the defendant qualified was owned by defendant and his son, but held under the circumstances as set out in the case that the objection was not tenable.

Bigelow for the plaintiff.

A. G. M. Spragge for the defendant.

Haldan v. Great Western Railway Company.

Railway—Accident—Negligence—Nonsuit.

The plaintiff, who was late for a train, attempted to get on to it as it was moving out of the station, and for such purpose was running along the platform by the side of the train, holding on to the iron railing of one of the cars, and after he had gone a certain distance, and as he was attempting to jump on to the car, he struck against a baggage truck which was on the platform, and was thrown under the train, and received an injury to his leg which rendered amputation necessary. In an action by plaintiff against defendants for the damages he had sustained.

Held, on the evidence more fully set out on the case, that the defendants were not liable.

Donovan for the plaintiff.

McMichael, Q. C., for the defendants.

McCall v. Higgins.

Temporary bridge over highway—Sufficiency of—Misdirection.

The defendants were contractors with the Dominion Government for the performance of certain work on the Welland Canal, a Government work. In the execution of the contract it became necessary to cut away the public road, and the contract provided that before such public road was cut away, or in any way disturbed, the contractors must provide another and satisfactory means for public travel, and defendants were to be held liable for performing everything connected with the crossing in such a condition that it could safely be used, The defendants erected a bridge over the road so cut away, but, as the plaintiff contended, not sufficient for the purpose, in consequence of which, the plaintiff was injured. The learned judge, at the trial, told the jury that the defendants were only bound to provide a temporary structure of the like nature which a municipality would be warranted in putting up while a permanent bridge, which had been carried away, was being put up and rebuilt.

Held, that there was misdirection, and a new trial must be granted; that the jury should have been told that, although such temporary bridge need not be constructed with the same care and finish as a permanent bridge, yet equally therewith it must answer its intended purpose, and, if substituted for a highway, must be constructed and maintained so as to be a safe and strong roadway for the public travel, and the jury must be asked whether at the time of the accident it was of that character.

J. A. Miller for the plaintiff.

Bethune, Q. C., for the defendant.

Gibbs v. Dominion Bank.

Warehouse receipt—continuing security—Term—Money had and received.

The defendants advanced $2,250 on the security of a warehouse receipt for grain purchased by a firm of grain buyers, F. & McL., who were in reality purchasing for the plaintiffs, though, so far as appeared, on their own behalf. F. & McL. subsequently paid $1,920, which they received from

plaintiffs, into the bank on account of this advance, leaving a balance of $330 still due. The defendants were notified by plaintiffs that they were the owners of the grain, but in disregard of such notice, sold the grain, contending that the warehouse receipt was a continuing security for F. & McL.'s general indebtedness to the bank, which then exceeded $2,250. The plaintiff having brought trover,

Held, that the evidence shewed that the warehouse receipt was not such continuing security, but was only to be security for the amount actually advanced upon it, and that trover would lie for selling more grain than was sufficient to satisfy the amount so due the bank; that in any event an action for money had and received would lie, and that an amendment, if it was necessary, adding such a count would now be allowed.

McMichael, Q. C., for the plaintiffs.

Robinson, Q. C., and *W. Mulock* for the defendants.

May v. Standard Insurance Company.

Insurance—Seizure of goods—Avoidance of policy—Reasonable conditions.

A condition of a policy of insurance provided that if the property insured should be levied upon or taken in possession or custody under any legal process, or the title be disputed in any proceeding at law or in equity, the policy should cease to be binding on the company. The insured property, which consisted of goods and chattels, was mortgaged by K., the assured, to the plaintiff. An execution against goods issued against K., who was in actual possession of the goods, under which the sheriff made a seizure, but on obtaining a bond from K. for their re-delivery he withdrew from possession.

Held, that that part of the condition, which provided for the goods being levied on or taken under execution, &c., was just and reasonable, and that what took place here constituted a valid seizure within the meaning of the condition.

Semble, that the latter part of the condition, which referred to title being disputed, &c., was unjust and unreasonable.

McMichael, Q. C., for the plaintiff.

Bethune, Q. C., for the defendants.

Dunbar v. Larkin.

Contract—Damages.

A contract was entered into between the plaintiff and defendant, whereby it was agreed that if defendant should obtain from the Department of Public Works the contract for doing the work on section one of the Welland Canal enlargement, the defendant was to have certain dredging connected therewith at prices agreed upon. The plaintiff bound himself to perform the work, and upon the faith thereof, the defendant put in a tender for the contract. The defendant obtained the contract, though not at the tender prices, but on his agreeing to take it at the prices named in the lowest tender. The defendant then refused to give plaintiff the contract for the dredging, but gave it to another at prices less than the plaintiff was to have, and he entered upon the performance of the work, and had performed a large portion thereof. In an action by plaintiff against defendant for breach of the contract,

Held, that the defendant was liable.

Held, also, that the plaintiff was not bound to wait until the completion of the entire contract before he could sue for damages; and that on the evidence, set out in the case, the damages were ascertainable, which in this case the majority of the Court found to be $5,000.

Per Wilson, C. J., dissenting as to the amount of damages, that they should be $25,000.

Ferguson, Q. C., for the plaintiff.

Robinson, Q. C., and *J. A. Miller* (St. Catharines), for the defendant.

Anglin v. Nickle et al.

Railway—Land taken for railway purposes—Action on bond to pay amount awarded—What covered by bond—Freehold and leasehold lands—Description—Costs—Execution by two of three arbitrators—Sufficiency—Tender of conveyance—Necessity for.

This was an action on a bond, given by the defendants to the plaintiff which, after reciting the fact of a notice having been served on the plaintiff by the Kingston and Pembroke Railway Company, requiring

certain lands of the plaintiff therein fully specified for the purposes of the railway and offering a named sum as compensation which the plaintiff had refused, was conditioned for the payment of the sum which should be found due plaintiff by the award to be made under the Railway Act of 1868, for damage sustained by plaintiff and compensation due him by reason of the railway company taking and retaining possession of his land, and for interest and costs lawfully payable to the plaintiff. The plaintiff was awarded a certain sum for his freehold land, and also an annual sum for his leasehold interest.

Held, that the bond would cover the first named sum, but not, under the circumstances of the case, the latter.

Held also, that the amount awarded in this case was less than the amount tendered in the notice served, and therefore defendants were entitled to deduct from the compensation awarded the costs of the reference and award.

In the award the freehold land of the plaintiff was described "as the freehold portion of his land taken."

Held, that this was a sufficient description as it could be identified by the notice, and also by the plan filed.

The reference was before three arbitrators and the award was executed by two only of them. It appeared that, at a meeting of the arbitrators, a rough sketch of the award was prepared and read over to them and was agreed to by two and dissented from by the third, and on the next day without any further meeting of the arbitrators, the formal award on the terms of the draft was drawn up and executed by the two assenting arbitrators.

Held, that under sec. 17 of the Act of 1868, the award was invalid; and *semble* it was so apart from that Act.

Held also, that before suing for the compensation awarded, plaintiff should have tendered a conveyance or should have averred his readiness and willingness to do so.

Macdonald (of Kingston) for the plaintiff.
Robinson, Q. C., for the defendants.

Evans v. Ross.

Insolvency—Action to recover goods sold contrary to secs. 133, 134, *of the Insolvent Act.*

This was an action by plaintiff as assignee in insolvency of W. & Co. to recover certain goods alleged to have been sold or transferred to defendant contrary to secs. 133 and 134 of the Insolvent Act. It appeared that defendant, who was a retail merchant at Port Hope, accepted, for the accommodation of W. & Co., wholesale merchants, at Montreal, a draft for $810.00 at 30 days, which became due on November 18th, 1877, and was protested for non-payment, and on 20th November defendant received notice of dishonour. On that day the defendant went to Montreal, and on the following day procured goods from W. & Co. consisting of two parcels, one of which was of the value of $853.00, and were sold at 6 months' credit. It was arranged that for these goods defendant was either to give his note at 6 months, which W. & Co. were to discount and take up the draft, or they were to allow defendant a discount of 8 per cent. on the goods, and he was to take up the draft himself. The defendant accepted the latter terms and paid the draft. On November 23rd, W. & Co. made an assignment under the provisions of the Insolvent Act to the plaintiff. The jury found that the defendant purchased the goods in good faith, and in the ordinary course of business, and not merely for the purpose of getting his acceptance paid; that he did not know or have probable cause for believing W. & Co. were unable to meet their engagements; and that defendant did not by his purchase obtain an unjust preference.

Held, under these circumstances, the plaintiff could not recover.

Robinson, Q. C., for the plaintiff.
Bethune, Q. C., for the defendant.

Board of Education of Paris v. Citizens Insurance Co. and Investment Co.

Guarantee Co.—Bond of—Liability for default of plaintiffs' treasurer—Payment out of moneys—Auditors—Appropriation of payments.

Action on a guarantee policy for $2,000 against loss or damage by the fraud or dis-

honesty of one D., the plaintiffs' secretary and treasurer, alleging that D. had received certain moneys of the plaintiffs, and fraudulently and dishonestly appropriated the same to his own use. The policy was granted on the faith of the truth of the answers to the questions contained in the guarantee proposal, by one of which it was stated that all moneys would be drawn out from the bank where they were deposited, only by the authority of the Board of Education. The course of dealing here was for the Board to give D. orders for the payment of all accounts, and D. then drew his own cheques for the amounts, the order not being attached thereto nor were they countersigned by any of the board, and there was nothing to prevent D. drawing out as he did the moneys for his own purposes.

Held, that the terms of the guarantee in this respect had not been complied with.

Another of the answers stated that D's cash and securities would be examined and verified by the auditors as required by the statute. It appeared that Paris was not an incorporated town withdrawn from the county.

Held, that the audit should have been by the county auditors, and not by the town auditors as was the case here, and therefore that, in this respect also, the guarantee had not been complied with.

Held also, that the evidence shewed that there had been no proper audit in fact.

There was also a question raised in this case as to the amount of default for which defendants could be liable, and as to the appropriation of certain payments made by D.

Robinson, Q. C., for the plaintiffs.

Fleming (of Brampton) for the defendants.

VACATION COURT.

VASHAN v. CORPORATION OF EAST HAWKESBURY.

Municipal corporation—By-law closing up road—Application to quash—Proof of by-law—Private way—Notice—Compensation—Councillor—Interest of.

On an application to quash a township by-law closing up a road, the applicant's affidavit stated that he applied to the township clerk for a certified copy of the by-law, and that in compliance therewith he received the following: "By-law, No. 188, for stopping up and closing the road, &c. Passed 3rd December, 1877;" and after giving its enacting clause stated, "verified —a true copy."

M. MANEELY,
Township Clerk.
[Township Seal.

"Made at, &c., this 17th day of Jan., 1878."

Held, by *Osler*, J., that there was sufficient proof of the by-law under sec. 322 of the Municipal Act.

One of the objections was that the road was a private way over one C's farm, and therefore not within the jurisdiction of the council.

Held, that this objection was not now open to the applicant, as it appeared that he had himself treated it as a public highway, and had had C. convicted several times for obstructing it as such.

Another objection was the want of notice and due publication of the intention to pass the by-law.

Held, on the evidence that this objection was not tenable.

Held, also, following *McArthur* and *Corporation of Southwold*, 3 App. 298, that the deprivation of the use of the road to the applicant, if the by-law had that effect, was a subject for compensation, which need not be provided for in the by-law.

The only persons really interested in the maintenance or closing up of this road were the applicant and C., who was instrumental in having the by-law passed. The township council consisted of five members, of whom C. was one, the concurrent votes of three of whom was necessary to the passing of a by-law. In this case the by-law received three votes, but one of such votes was C.'s.

Held, that the by-law could not be upheld, for that C.'s interest in its passage, which was apart from that of the public, disentitled him from voting.

McMichael, Q.C., for the applicant.

Robinson, Q.C., *contra*.

HALL v. LAMIN.

Insolvency—Dissolution of partnership—Subsequent insolvency of continuing partner—Proof of claim of retiring partner—Equitable debt.

Under articles of partnership made between W. and McC. the stock and other partnership property were, on the dissolution thereof, to be divided between the parties in proportion to the amount of capital respectively contributed by them, as appearing by the last stock-taking, less the amount afterwards withdrawn. The partnership was subsequently dissolved, and it was agreed that all the partnership assets should become vested in W., who should collect the debts and pay the liabilities of the firm, and an account should be taken to ascertain the amount payable by either to the other, and in pursuance of such agreement W. conveyed to McC. all his interest in the assets, and was discharged from all the liabilities of the firm. W. had an account taken by an accountant, under which he claimed that a balance was due him, but this was not done in McC.'s presence, and was not admitted by him to be correct, and in fact there was no settlement between the partners. McC. continued to carry on the business on his own behalf, and while so doing became insolvent, and entered into a composition with his creditors, one-half of such composition being secured by a bond given by the defendant to the plaintiff, the assignee in insolvency. The plaintiff claimed that W. was entitled to rank upon the estate for the balance alleged to be due him, and brought an action on the bond for the amount of the composition thereby secured as regards W.'s claim.

Held, by *Osler*, J. that the plaintiff was entitled to recover; that W.'s claim was an equitable debt capable of being ascertained by the Court, and was therefore one for which W. was entitled to rank upon the estate.

Watson, for plaintiff.

J. K. Kerr, Q.C., for the defendant.

CHANCERY.

Proudfoot, V. C.] [May 28.

COURCIER v. COURCIER.

Infant—Joint tenant—Ouster—Rents and profits.

The general rule in equity that an infant is entitled to treat a person who takes possession of his estate as his bailiff or agent applied in a case where the party in possession was a tenant in common with the infant, although there had never been any ouster or exclusion of the infant, or any denial of his title.

Proudfoot, V. C.] [May 28.

LUCAS v. HAMILTON.

Trust deed—Power of appointment.

T. C. K., by a deed of 7th April, 1870, conveyed lands to two trustees to and for the sole and absolute use of his wife, C. E. K., for and during the term of her natural life, to and for her own separate use and benefit, or to the use of such person or persons and for such estates and interests as she, notwithstanding her coverture, should by any deed or writing under her hand and seal, or by her last will, appoint. By a deed made two years afterwards, T.C.K. conveyed other lands to the same trustees, upon the same trusts as were set forth in the former deed. One of the trustees having died, and the other having removed from this Province, C.E.K., professing to be acting in pursuance of the power contained in the first-mentioned deed, by a deed made in 1877, appointed the plaintiffs trustees of the lands mentioned in the second deed, to hold upon the trusts of the deed of 1870. By a deed poll made in July, 1878, C.E.K., after reciting these several conveyances appointed the premises by the deed secondly above conveyed to the plaintiffs, upon trust to permit C.E.K. to use, &c., the said lands for life, or until she should require the trustees to sell, and after her death, without such requisition to sell, to permit T.C.K. to use and enjoy the same premises for his life, and, on his request, to sell, &c., and upon the death of T.C.K. and C.E.K. upon trust for their children in such proportions

as C. E. K. should appoint, &c. T. C. K. died.

Held, that under these conveyances the plaintiffs could, on the request of C.E.K., make a good title to the lands in question in fee.

The manner in which deeds had been drawn was such as to invite inquiry as to the power of trustees to convey; and, therefore, although the Court had not any doubt of the effect and operation of the conveyances, it refused, on an investigation of title under the Vendor and Purchaser's Act, to give to either any costs of the inquiry.

CHANCERY CHAMBERS.

Referee.] [June 3.
Proudfoot, V. C.] [June 9.

Re Solicitors.

Sale under power in mortgage—Solicitors' costs—Taxation by subsequent encumbrancer.

First mortgagees sold under a power in their mortgage and paid their solicitor's cost of sale. A subsequent encumbrancer obtained from the Referee, on motion, an order for the taxation of the solicitor's costs.

This order was reversed by Proudfoot, V.C., on appeal, and the objection that the order should have been obtained by petition, not notice of motion, was disallowed.

Referee.] [June 11.
Blake, V.C.] [June 19.

Gzowski v. Beaty.

Deposit for sale—Who entitled to—Subsequent encumbrancer.

A first mortgagee filed his bill for foreclosure, and the official assignee of the insolvent defendant's estate paid into Court $150 to secure a sale. After the sale, the Referee made an order for payment out to the assignee of this deposit.

Bain, for the Imperial Bank, a subsequent encumbrancer, appealed from the order of the Referee, and contended that deposit should be paid to the latter.

McDonald, contra.

Creelman, for the plaintiff.

Blake, V. C., allowed appeal with costs.

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR AUGUST, SEPTEMBER, AND OCTOBER, 1878.

Absolute Gift.—See Will, 2.

Acceptance.—See Bills and Notes; Company, 2.

Acquiescence.—See Waste.

Action of Ejectment.—See Limitations, Statute of, 1.

Alimentary Fund.—See Trust, 2.

Amalgamation.—See Company, 1.

Arrestment, See Trust, 2.

Assignment.

1. M., being in debt, assigned all his property to the defendant, and mortgaged some leasehold property to him to enable him to borrow money, all for the purpose of paying off and settling with M.'s creditors, among whom was the plaintiff. The defendant realized large sums from the property, and paid some of the debts, but not the plaintiff's. The plaintiff claimed an account, and that M.'s estate should be administered by the Court, and his and the other debts paid. There was no allegation that plaintiff had had notice of the assignment by M. to the defendant. Demurrer allowed. *Gerard* v. *Lauderdale* (2 Russ. & My. 45) and *Acton* v. *Woodgate* (2 My. & K. 492) approved. *Dictum* of Knight Bruce, V. C., in *Wilding* v. *Richards* (1 Coll. 655), disallowed. *Johns* v. *James*, 8 Ch. D. 744.

2. One G. contracted to build the defendant a ship for £1,375, payment to be made in instalments. G. was short of means, and the defendant made advances to him to enable him to continue the work, so that on October 27, when, by the contract, G. should have been paid only £500, he had been advanced £1,015. On that date G. gave an order to the plaintiff, to whom he owed a large sum, upon the defendant, to pay the plaintiff £100 out of the money "due or to become due" from the defendant to G. The plaintiff gave due notice of this order to the defendant; and the latter acknowledged it, but refused to be bound by it, and continued to make advances to G. up to the full contract price. Without these advances, G. would have been unable to complete his contract with the defendant. The Judi-

cature Act, 1873, § 25, sub-s. 6, provides that a written assignment of a *chose in action* shall be valid, if due written notice be given thereof to the person liable thereon. *Held*, that the assignment was good and binding on the defendant, and he must pay the plaintiff the £100, although he had already paid it to G.—*Brice* v. *Bannister*, 3 Q. B. D. 569.

Bankruptcy.—See Custom.

Bequest.—See Devise; Trust, 3; Will, 1.

Bill of Lading.—See Bills and Notes, 3.

Charter-party, 2.

Bills and Notes.

1. The defendant gave H. his acceptance to an accommodation bill, by writing his name across a paper bearing a bill-stamp, and handing it to him. H. turned out not to need the accommodation, and returned the blank to defendant as he had received it. Defendant threw it into an unlocked drawer in a writing desk in his chambers, to which his clerk and other persons had access, and it was stolen, and the plaintiff received it *bona fide* for value, with the name of one C. regularly filled in. *Held*, that the defendant was not liable on the bill. Estoppel, negligence, and the proximate or effective cause of the fraud discussed.—*Baxendale* v. *Bennett*, 3 Q. B. D. 525.

2. A bill of exchange was drawn in England on a party in Spain, payable to defendant in Spain three months after date. The plaintiff purchased the bill in London from the defendant, who indorsed it to him there. Plaintiff indorsed it to one M., and forwarded it to him in Spain. M. indorsed it to C., and C. indorsed it to O., all in Spain. The bill was presented in Spain May 1, and dishonoured; and notice of the refusal to accept was sent to the plaintiff by M. May 13, and received May 26. Plaintiff gave notice to the defendant May 26. In Spain, no notice of non-acceptance is essential. *Held*, that the plaintiff could recover.—*Horne* v. *Rouquette*, 3 Q. B. D. 514.

3. The plaintiff, a merchant in London, procured a loan of £15,000 of the defendant bank, on the security of a cargo of goods in transit to Monte Video, and of six bills of exchange drawn by him on S., the consignee of the goods in Monte Video, and accepted by the latter. Two of these bills having been paid and two dishonoured, the defendant bank, through its branch in Monte Video, proposed to sell the goods at once, when the plaintiff wrote to the defendant not to sell, and sent his check for £2,500, as additional security, adding that, when the bills were paid, "you will, of course, refund us the £2,500." The defendant drew the check, and, the other two bills having been dishonoured, the defendant took proceedings against S., as a result of which the goods were, with the plaintiff's consent, sold, and the bills, without the plaintiff's knowledge, delivered up to S. cancelled. The proceeds of the goods were insufficient, even with the £2,500, to satisfy the claim. *Held*, that the plaintiff could not recover the £2,500 from the defendant.—*Yglesias* v. *The Mercantile Bank of the River Plate*, 3 C. P. D. 330; c. 3 C. P. D. 60; 12 Am. Law. Rev. 723.

Breach of Trust.—See Trust, 3.

Burden of Proof.—See Insurance, 3.

Cause.—See Negligence.

Charity.—See Will, 4.

Charter-party.

1. A charter-party contained this clause: "Demurrage, if any, at the rate of 20*s.* per hour, except in case of any hands striking work, frosts or floods, revolutions or wars, which may hinder the loading or discharge of the vessel. Dispatch money 10*s.* per hour on any time saved in loading and for discharging." "Steamers are to load and discharge by night as well as by day. *Held*, that, in estimating dispatch money, nine days saved in loading and discharging should be reckoned at twenty-four hours each, and not at twelve.—*Laing* v. *Hollway*, 3 Q. B. D. 437.

2. By a charter-party between the plaintiff and B., it was stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage over and above the loading and unloading days, at £35 per day. A full cargo of grain was taken on board, a part of it consigned to the defendants, and lying at the bottom of the hold. The bill of lading endorsed to the defendants contained the words, to be delivered to order, "on paying freight for the said goods, and all other conditions as per charter-party." The consignees of the grain lying above that of defendants failed to get their grain out in season, so that three days' demurrage accrued before defendants' grain was out. *Held*, that the defendants were liable.—*Porteus* v. *Watney*, 3 Q. B. D. 634.

See Freight.

Chose in Action.—See Assignment, 2.

Codicil.—See Devise; Will 6.

Common Informer.—See Corporation.

Condition.—See Legislation; Limitations, Statute of, 2.

Consideration.

B. lent L. £1,328, to enable L. to settle betting debts already incurred, and took two promissory notes. L. went into bankruptcy. *Held*, that the claim could be proved, the debt not being for an "illegal consideration," by virtue of being for money "knowingly lent or advanced for gaming or betting," within the meaning of 5 & 6 Will. IV. c. 41, § 1.—*Ex parte Pyke. In re Lister*, 8 Ch. D. 754.

See Contract, 1, 2.

Construction.—See Landlord and Tenant; Statute; Will. 1, 5, 6.

Consul.—See Jurisdiction.

Contract.

1. The plaintiff was in a position of trust towards the E. railway company, having been employed by it to give advice as to repairing some ships. The defendants agreed to pay the plaintiff a commission, partly for superintending the repairs, which had been awarded to them, and partly as the jury found, for using his influence with the E. company to get their bid accepted. The jury also found that the agreement with the defendants was calculated to bias his mind; but that it in fact did not, and that his advice was equally for the benefit of the company, and that the company was ignorant of the agreement. *Held*, that the consideration of the contract for a commission was corrupt, and the plaintiff could not recover.—*Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. D., 549.

2. In October, 1869, the plaintiff made an arrangement with the agent of the defendant to supply the latter with coal-waggons on certain terms. After the agreement was made, the plaintiff agreed to give the agent a gratuity for each waggon supplied. This was done, as the plaintiff said, with a view to future business. In December, before this agreement was executed, it was supplanted by another between the same parties, which proved much less favourable to the defendant than the other would have been. Pollock, B., directed the jury that a commission to an agent, though improper, was not necessarily fraudulent; and, in order to affect the contract, it must have been intended by the giver to corrupt the agent, and the latter must have been influenced by it. On a rule *nisi*, a new trial was ordered for misdirection If a party with whom an agent is negotiating for another agrees to give, or does give, the agent a secret gratuity, and that gratuity influences the agent's mind, directly or indirectly, the contract is vitiated. The direction of Pollock, B., did not make it clear that, though the gratuity was given with reference to the first contract only, it might yet have influenced the agent with reference to the second.—*Smith* v. *Sorby*, 3 Q. B. D. 552. Note.

3. H. wrote to W., offering his entire freehold for £37,500, or a portion of it for £34,500, and in a postscript added, that he reserved the right to the new materials used in rebuilding a house on the land, and the fixtures. W. replied, accepting the terms, and agreeing to pay the £37,500, "subject to the title being approved by our solicitors." Subsequently W. insisted that he must be allowed to pay in instalments. This was agreed to. Subsequently W.'s solicitor left with H.'s solicitor a written agreement of the terms of payment, headed "Proposal by H. for purchase of the M. estate." This was verbally accepted, and H. was to have his counsel prepare a formal contract; but none was ever made. H. subsequently declined to perform, and W. brought suit for specific performance. *Held*, that the two letters did not form a complete contract; the phrase, "subject to the title being approved by our solicitors," being a new and material term not accepted by the other party. It amounted to something more than merely what the law would imply.—*Hussey* v. *Horne-Payne*, 8 Ch. D. 670.

Conversion.—See Innkeeper.

Copyright.—See Trade-mark.

Corporation.

A corporation cannot recover a penalty, under a statute which provides that a penalty is recoverable "by the person or persons who shall inform and sue for the same."—*The Guardians of the Poor, &c.* v. *Franklin.*

Co-Trustee.—See Trust, 1, 3.

Covenant.—See Landlord and Tenant.

Creditor.—See Assignment, 1.

Custom.

By agreement, dated August 21, 1877, B. hired a piano of H. for £15 a year, payable monthly. At the end of three years, if the

payments had been all made, the piano was to become the property of B. But if he failed to pay a monthly instalment, or if B. became bankrupt, or insolvent, or died within the three years, H. should have the right to take the property at once, without paying any thing on account of what had been paid. December 11, 1877, B. filed a petition in bankruptcy, and H. removed the piano; but it was claimed by the trustee. There was no special mark on the piano indicating that it was B.'s. There was conclusive evidence of the existence of a custom to let pianos in this manner. *Held*, on the strength of the custom, that the piano was the property of H., and the trustee had no claim to it.—*In re Blanshard. Ex parte Hattersley*, 8 Ch. 601.

Debt.—See Assignment, 2.

Delay.—See Bills and Notes.

Demurrage.—See Charter-party, 2.

Deviation.—See Insurance, 1.

Devise.

P. devised freehold in D. upon trust, and bequeathed £3,000 to his trustees to purchase land in D. for the same trust. In a codicil, he revoked the devise of the freeholds, without more. *Held*, that the bequest of £3,000 for the purpose named was not affected by the codicil.—*Bridges* v. *Strachen*, 8 Ch. D. 558.

See Will, 1, 7.

Director.—See Company, 1, 2, 3.

Discretion.—See Trust, 3.

Divisibility.—See Fraud.

Divorce.—See Jurisdiction.

Domestic Relations.—See Husband and Wife.

Equitable Estate.—See Will, 1, 7.

Estoppel.—See Bills and Notes, 1.

Evidence.—See Company, 2; Limitations, Statute of, 2.

Exchange, Bills of.—See Bills and Notes.

Executor.—See Will, 4.

Executory Gift.—See Will, 7.

Extrinsic Evidence.—See Will, 5.

Falsa Demonstratio.—See Will, 5.

Fee.—See Will, 7.

Fraud.

Contracts which may be impeached on the ground of fraud are void, but not voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state. Otherwise resort must be had to an action for damages. Divisability of a contract for dissolution of partnership considered.—*Urquhart* v. *Macpherson*, 3 App. Cas. 831.

See Contract, 2.

Gaming Debt.—See Consideration; Statute.

General Average.—See Insurance, 2.

Highway.—See Negligence.

Husband and Wife.

1. The defendant and his wife separated by mutual consent, and agreed upon the sum which the wife should receive so long as the children taken by her were under twenty-one. She found the sum insufficient to support herself and them, and pledged the husband's credit for necessaries. *Held*, that the husband was not bound.—*Eastland* v. *Burchell*, 3 Q. B. D. 432.

2. A wilful wrongful refusal of marital intercourse on the part of the wife is not in itself sufficient ground for a declaration of nullity. The Court proceeds on the ground of impotence, and if after a reasonable time the wife still resists all intercourse, the Court will infer that impotence is the cause, and, if satisfied of *bona fides*, will decree nullity of the marriage.—*S.* v. *A.*, otherwise *S.*, 3 P. D. 72.

3. In a suit by the wife for restitution of conjugal rights, a compromise was agreed to. The petitioner then refused to sign the memorandum of the compromise, and had the suit set down for hearing. *Held*, that she must be held to the agreement which she had made.—*Stanes* v. *Stanes*, 3 P. D. 42.

See Jurisdiction.

Impotence.—See Husband and Wife, 2.

Indictment.—See Libel, 3.

Indorser.—See Bills and Notes, 2.

Injunction.

Injunction to restrain a lessee from tearing down old buildings, and putting up new in their place, refused on the ground that, if there was technical waste, it was meliorating waste.—*Doherty* v. *Allman*, 3 App. Cas. 709.

See Libel, 2.

Innkeeper.

B. went to an inn as an ordinary guest in September, 1876, and in November following, a pair of horses, harness, and a waggon came to the inn as B's personal property, and not on

livery. B. told the innkeeper he had bought them of the plaintiff. B. left in January, 1877, owing £109 for his own board and £22 10s. for the horses'. It turned out that B. had bought the property from the plaintiff upon the terms that, if it was not paid for, it should be returned free of cost. B. never paid for it; and he was afterwards convicted of fraud in obtaining it. The innkeeper refused to surrender the property to the plaintiff on an offer of £20 for the board of the horses; but he sold the horses by auction for £73, and kept the harness and waggon, and claimed to apply the whole under his lien towards paying the whole claim held by him against B. *Held*, that his lien on the whole property was a general one for the whole debt of B., and not merely for the board of the horses; but that the lien on the horse was lost by the sale, and the innkeeper was guilty of a tortious conversion thereby, and the plaintiff could recover the price received —*Mulliner* v. *Florence*, 3 Q. B. D. 484.

Insurance.

1. A policy on steam-pumps sent out from A. in the wrecking steamer S., to raise the foundered steamer X., at D., ran thus: "At and from A. to the X. steamer, ashore in the neighbourhood of D., and whilst there engaged at the wreck, and until again returned to A., . . . the risk beginning from the loading on board the S. upon the said ship and or wreck, including all risk of craft, and for boats to and from the vessel and whilst at the wreck, each being treated as separately insured." The wreck was raised; but on the way to B., whither by reason of bad weather it was found necessary to steer, it foundered with the pumps on board. *Held*, that the policy did not cover the loss.—*Wingate* v. *Foster*, 3 Q. B. D. 582.

2. The defendant was underwriter for £1,200 on plaintiff's ship, valued in the policy at £2,600. The cost of repairing certain damages by sea was, after deducting one-third new for old and some particular average charges, £3,178 11s. 7d., and the salvage and general average charges paid by the plaintiff were £515. The value of the ship when damaged was £998; after repairs, £7,000; which last sum was, even after deducting the cost of certain new work not charged against the underwriters, much more than the original value of the ship. The policy contained a suing and labouring clause. *Held*, that the defendant must pay the whole £1,200 on account of loss, and the expense of repairs, and also a proportion of the £515 under the suing and labouring clause.—*Lohre* v. *Aitchison*, 3 Q. B. D. 558; s. c. 2 Q. B. D. 501; 12 Am. Law Rev. 309.

3. A ship arrived at R., April 25, in a seaworthy condition. She left there June 4, with a cargo, encountered heavy gales between the 9th and the 15th, and made so much water that it was thought best to put back to R. On the way she got aground, but was gotten off, and arrived at R. June 20. She was found very much strained and worm-eaten, and with her copper off badly; and July 15, she was pronounced unseaworthy. In an action on a policy of insurance, the question was whether she became unseaworthy after she left R., or became so while lying at R., between April 25 and June 4. The judge charged the jury that, though the *onus* of proving unseaworthiness at the commencement of the voyage is generally on those asserting it; yet, when a ship becomes unseaworthy shortly after leaving port, the burden is changed, and the presumption is that she was unseaworthy at the start, and that the present was such a case. *Held*, a misdirection. *Watson* v. *Clark* (1 Dow., 336, 344), construed.—*Pickup* v. *The Thames & Mersey Insurance Co.*, 3 Q. B. D. 594.

Investment.—See Trust, 1.

Jury.—See Libel, 2.

Landlord and Tenant.

In a lease for twenty-one years, the defendant, the lessee, covenanted to pay the rent without any deduction, except land tax and landlord's tax; also to pay and discharge all manner of "taxes, rates, charges, assessments, and impositions whatever (except as aforesaid), then, or at any time or times during the term to be charged, assessed, or imposed in the premises thereby demised, or in respect thereof, or of the said rent as aforesaid, by authority of Parliament, or otherwise howsoever." The officers under the Public Health Act, 1875, notified the lessor to abate a nuisance on the leased premises by building a drain and deodorizing a cesspool. The lessor called upon the lessee to do it, and he refused. Thereupon, in order to avoid summary proceedings, the lessor did the work, paying therefor £25. *Held*, that the lessee was not called upon, under his covenant, to pay the amount.—*Tidswell* v. *Whitworth* (L. R. 2 C. P. 326) and *Thompson* v. *Lapworth* (L. R. 3 C. P. 149) referred to.—*Rawlins* v. *Briggs*, 3 C. P. 368.

See Surety.

Lease.—See Customs; Landlord and Tenant; Limitations, Statute of, 1; Surety; Waste.

Legacy.—See Will.

Legislation.

Where plenary powers of legislation exist as to particular subjects, they may be well exercised, either absolutely or conditionally. It may be declared that a statute shall apply, if and when a certain executive officer shall think best to order that it shall apply.—*The Queen* v. *Burah*, 3 App. Case, 889.

Letters.—See Contract, 3.

Libel.

1. Three persons made an application to a magistrate for a summons against the plaintiff, in respect of a matter of wages. The proceedings were public, and the magistrate dismissed the application for want of jurisdiction. The defendants afterwards published a fair report of the proceedings in their respective newspapers, for which the plaintiffs brought libel suits against them. *Held*, that the publication was privileged.—*Usill* v. *Hales*. *Same* v. *Brearley*. *Same* v. *Clarke*, 3 C. P. D. 319.

2. A court may enjoin the publication of what a jury has found to be a libel on the plaintiff, if the publication will injure the plaintiff's business; *aliter*, if a jury has not passed upon the question whether the publication is a libel.—*Saxby* v. *Easterbrooke*, 3 C. P. D. 339.

3. An indictment for an obscene publication is bad, even after the verdict of guilty, if it fails to set out the words relied upon as obscene, and sets out the titles of the work only.—*Bradlaugh* v. *The Queen*, 3 Q. B. D. 607; s. c. 2 Q. B. D. 569; 12 Am. Law Rev. 313.

Lien.—See Innkeeper.

Limitations, Statute of.

1. In 1783 a lease was granted for ninety-nine years, and there was enjoyment under the lease until 1876, when an action was brought for possession on the ground that the lease was void, under 13 Eliz. c. 10. *Held*, that the lease was not void but voidable, and, as an action of ejectment might have been begun at once, the Statute of Limitations began to run at the time of the lease, and not from the date of the action.—*Governors of Magdalen Hospital* v. *Knotts*, 8 Ch. D. 709; s. c. 5 Ch. D. 175; 12 Am. Law Rev. 105.

2. Defendant owed plaintiffs a large debt, incurred in 1865, and, in answer to a demand, wrote them a letter in May, 1874, in which he said: "Believe me, that I never lose out of my sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." It appears that, in 1874, defendant's condition was bettered by £14, but was no better in any other year. *Held*, that if there was a promise, it was a conditional one, and there was not sufficient evidence that the condition had happened to take the case out of the statute.—*Meyerhoff* v. *Froehlich*, 3 C. P. D. 333.

Lis Pendens.—See Trust, 2.

Marine Insurance.—See Insurance, 1, 2, 3.

Married Woman.—See Husband and Wife; Jurisdiction.

Master.—See Shipping and Admiralty.

Mines.—See Waste.

Misdescription.—See Will, 5.

Misdirection.—See Insurance, 3.

Mortgage.—See Freight; Waste.

Negligence.

The defendant left a steam-plough, with a house-van attached, on the grass by the side of the "metalled" or travelled part of the road, the engine being taken away. He was in the habit of travelling from place to place with it, and had left it there, as it was engaged near by for the next day. The plaintiff's testator drove by in the evening in his cart with a mare which, though without his knowledge, was a kicker. The mare shied at the van, got the off-wheel on the foot-path, began to kick, kicked the dasher to pieces, ran, got her leg over the shaft, fell, and pitched the driver out and kicked him in the knee, so that he afterwards died. The jury found that the van was left where it stood "unreasonably" and "negligently," that the accident was "due to the van being where it was, and to the inherent vice of the mare combined," and that there was no contributory negligence on the part of the deceased. *Held*, that the plaintiff was entitled to recover, on the ground of the negligence of the defendant, and that this act was the real cause of the accident.—*Harris* v. *Mobbs*, 3 Ex. D. 268.

See Bills and Notes, 1.

Notice.—See Assignment, 1; Bills and Notes, 2; Surety.

(*To be continued.*)

REVIEWS.

A Manual of the General Principles of Law as Stated in Blackstone and other Writers. With a Law Glossary. By M. E. Dunlap, Counsellor-at-Law, St. Louis. F. H. Thomas & Co., 1879.

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The amount of information it contains is marvellous when one looks at the outside of it. We strongly recommend all those who have anything to do with maritime law to get it at once.

FLOTSAM AND JETSAM.

Animals *ferœ naturæ* are as a class known to be mischievous, and whoever keeps them in places of public resort is liable for injuries committed by them to one not himself in fault. Whoever keeps a dangerous animal with knowledge of its dangerous propensities is liable to one injured thereby, without proof of any negligence or default in the securing or taking care of the animal. The defendant in error was attacked and injured by a buck while in a park owned by the plaintiffs in error, and into which the public were invited and freely admitted. The buck, with other deer, was at large in the park; there was no evidence that the buck had attacked others, but the company had a notice posted in the park to "Beware of the buck;" there was expert evidence that bucks were dangerous in the fall of the year, at which season the injury was received. *Held*, that the plaintiffs in error were liable.—*The Congress and Empire Spring Co.* v. *Edgar*.

A respectably dressed woman applied to Mr. De Rutzen at the Marylebone police court on Thursday for his assistance. She said she was being continually mesmerized and magnetized by her husband and his servants, and her bodily substance was being taken away by it. They could mesmerize her at a distance, and she was dying miserably by it. Mr. De Rutzen said he was afraid it was not a matter of which he could take cognizance. The applicant: If death ensues is not that enough? Death will ensue in a day or two, or in a week or two. I am being gradually murdered by my husband and his two English servants. It ought to be written down. Anybody who has an interest in another person's death might do this. Will you write down my complaint and summon my husband and his two servants? Mr. De Rutzen said that he could not do that. The applicant (vehemently): You have the power. It is a failure of justice. It is real murder. It is just the same as pointing a pistol

at a person's head. That woman who died in Kent died in this way. She was slowly mesmerized to her death. I am gradually dying, and the substance of my body is being taken away. I have had thirteen doctors during the year. Mr. De Rutzen suggested that he should send an officer to the house. The applicant: Cannot you have my husband before you and question him about it? Mr. De Rutzen said that he could not. The applicant: You are an English magistrate, and you connive at private murder! Good morning. She then left the Court.—*Pall Mall Budget, June 27th ult.*

It is doubtful if the history of criminal law can furnish a parallel to the crime for which Dye and Anderson were hanged at Sacramento last week. Dye was public administrator of Sacramento county, and in conjunction with Anderson and one Lawton, plotted the murder of several wealthy old residents of that county, supposed to be without heirs and intestate, in order that he might possess himself of their estates through the manipulations of his office. Killing a man in order to administer upon his estate is certainly a novelty. The scheme failed in execution in one instance, and through the discovery of a will or of heirs in others. At length the conspirators actually murdered one Tullis, who was thought to answer the requirements, but who turned out, like most men of property, to have heirs, namely, an afflicted brother and nephew waiting for his money. The discovery of the crime was equally singular. It was ascertained that the murderers had used a boat to go to the victim's residence, and on the boat, evidently a new one, were found pencilled figures and computations which proved to be the computation of the amount of lumber necessary to construct such a boat. Inquiry among the lumber-yards soon exposed the recent purchase of the exact kind and quality of lumber by the guilty parties, and Dye soon confessed. It is to be hoped that the new Constitution of California has made the office in question a salaried one, rather than dependent as formerly solely on the fees and perquisites derivable from the estates administered, and thus taken away such a fearful inducement to official diligence.—*Albany Law Journal.*

Prosecution of Offences Bill.—On Tuesday, May 27th ult., in the House of Lords, the Lord Chancellor, in moving the second reading of this bill, which had come up from the Commons, explained to their lordships that the measure had resulted from the recommendations of a royal commission. It was the opinion of those most conversant with the subject that in the administration of our criminal law there was no necessity for a general and thorough change; but some of the most eminent of the witnesses examined by the commission thought that some change was required. The object of this bill was to meet exceptional cases—such as large commercial frauds, in which private persons could not be expected to undertake the expense of prosecutions. The bill proposed that the Secretary of State should appoint an officer, who would be called the director of public prosecutions. It would be the duty of the latter, under the Secretary of State and the Attorney-General, to carry out prosecutions undertaken by the Government. Regulations would be made by the Attorney-General, with the approval of the Secretary of State, as to the exceptional cases in which prosecutions would be undertaken, and as to the mode in which the director of public prosecutions would give advice. The director of public prosecutions would be in the position of an Under-Secretary of State. Solicitors would be appointed for the assizes; and there would be a staff in the director's department, the number of which would depend on the work to be done. It would not be large at first. For the first time the law officers would have an office in London, and there would be a continuity of rules in their department. The noble and learned earl concluded by moving the second reading.—*The Law Journal, May* 31, 1879.

Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 42ND VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

Thomas Stinson Jarvis.
Thomas Taylor Rolph.
Louis Adolphe Olivier.
Malcolm Græme Cameron.
George Edgar Millar.
Nicholas Dubois Beck.
Walter J. Breakenridge Read.
Emerson Coatsworth, Jr.
John Morrow.
James Carman Ross.
Alphonse Basil Klein.
Edward George Ponton.

The names are given in the order in which they appear on the Roll, and not in the order of merit.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

John Dickinson, B.A.
John McLaurin, B.A.
Antoine P. E. Panet, B.L.

Matriculants.

Charles Reginald Atkinson.
John McCullough.
George William Ross.

Articled Clerks as of Hilary Term.

William Barr.
Edward Utton Sayers.
John Angus McDougal.
James A. Scott.
William Grayson.
John Lawson.
Francis Henry Butler.

Articled Clerk as of Easter Term.

Andrew Joseph Clark.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

Mathematics.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical analysis of a selected poem :—
1879.—Paradise Lost, Bb. I. and II.
1880.—Elegy in a Country Churchyard and The Traveller.
1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.
Translation from English into French Prose—
1878 and 1880 } Souvestre, Un philosophe sous les toits.
1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.
Musaeus, Stumme Liebe.
1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.
1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. / Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR SEPTEMBER.

2. Tues. ..Court of Appeal sits.
4. Thur..Napoleon III. deposed, 1870.
5. Frid...Convocation meets.
6. Sat. ..Trinity Term ends.
7. Sun. ..13th Sunday after Trinity.
9. Tues...County Court sittings for York begin.
10. Wed...Mr. Justice Willis died, 1877.
12. Frid...Frontenac, Governor of Canada.
13. Sat. ..Quebec taken by British under Wolfe, 1759.
14. Sun. ..14th Sunday after Trinity. Jacques Cartier arrived at Quebec, 1535.
16. Tues...Atlantic cable opened, 1858.
17. Wed...First U. C. Parliament met at Niagara, 1792.
19. Frid...Lord Sydenham, Gov.-Gen., died, 1841.
21. Sun. ..15th Sunday after Trinity.
24. Wed...Guy Carleton, Lieut.-Gov. and Com.-in-Chief, 1766.
28. Sun. ..16th Sunday after Trinity.
30. Tues...Sir Isaac Brock, Pres. Can. 1811.

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LAW SOCIETY OF UPPER CANADA .....

Canada Law Journal.

Toronto, September, 1879.

As we go to press, we see everywhere around us the tokens of active preparation for the fitting reception of the representatives of royalty in the chief city of Ontario. On our principal streets is seen the rapid metamorphosis of unsightly boards and heaps of evergreens into graceful arches, and gas-fitters, while they reap a golden harvest from the practice of their mystery, almost forget for the moment the ill-omened name of Edison. This is as it should be; and we are glad to learn that the legal profession, as represented by the Law Society, will show no remissness or lack of enthusiasm on this occasion, and that arrangements have already been made whereby the light of intellect, which, we trust, shines steadily in the court-rooms of Osgoode Hall, will be fitly typified by the gorgeous illumination of its windows.

It is a misfortune of editors of Law Journals that sea-serpents, brutal murders, and other well-known literary resources of the dead season are of no possible service to them. During ten months of the year, the work of the law-courts and the contemporary debates of the Legislature afford them an endless variety of topics. July comes and all is changed.

> "Ille terrarum mihi, præter omnes,
> Angulus ridet"

ries the jaded lawyer and rushes off to Murray Bay, or Orchard Beach, or whatever may be the Tarentum of his choice. The lonely caretaker lingers round the courts, the sole personal representative of the majesty of the Law; and in the offices of editors of Law Journals are to be

found the only men who wish the long vacation was over.

The disastrous results of the failure of the Glasgow Bank have given rise to a Bill which has been favourably received by the Imperial Parliament, and appears likely to pass into law in England. This Bill alters the position of unlimited joint-stock banks. It enables the shareholders of such a bank to limit their liability, should they so desire. At the same time, unlimited banks are not obliged to come under its operation; if they think it more to their advantage to remain unlimited, and if the shareholders are willing to face the risks. In the words of the *Saturday Review*:—"An unlimited bank will be able to register itself as a limited bank, and it may, of course, choose any kind of limitation it pleases. It may have half or a third only of its capital paid up, and then, in case of liquidation, the uncalled capital will be payable for the benefit of creditors. But unlimited banks that seek to limit their liability will, under the Bill, have another course open to them. They will be able to register as banks with reserved liability or limited by reserve. In case of disaster, the shareholders will be liable not only for the amount of their shares, but for a further sum, which is always to be a multiple of the amount of each share they hold. Every bank may choose what this multiple shall be. Some banks will choose to multiply by one, and then the reserve liability will be equal to the amount of the share. Others will multiply by two, and then the reserve will be equal to twice the amount of the share."

In his recent speech at the Mansion House, Lord Beaconsfield made the somewhat paradoxical assertion that, in his opinion, no tenure of land could be devised except on the condition of furnishing three incomes from the soil. We are wont to congratulate ourselves upon the fact, that whereas in the mother-country the soil has to support three classes of men—the landlord, the farmer, and the labourer—in Canada and America, the land is mainly in the hands of freeholders cultivating their own land, and therefore has only to furnish one income, in the place of three. If his Lordship is right, however, we are not really so exceptionally fortunate as we suppose. And certainly the way he sets to work to prove his point is most ingenious. First of all, he says, the freeholder has to purchase his land. This he will do, say, by selling out any stock he may hold in the funds, or more probably by borrowing. The first income, then, his land will have to furnish will go towards paying the interest on the money borrowed, or supplying the interest he would otherwise have derived from his moneys invested in the funds. Then, having purchased his farm he must stock it, provide implements, a cart and horse, and build, at all events, some sort of shed. This is the floating capital and demands the second income, which in England is enjoyed by the farmer. Lastly, having purchased and stocked his farm, he and his sons proceed to work it. But they have to be fed and clothed and lodged, and this is the expenditure answering to wages under the system in England. This, then, is the third income which the land is obliged to produce under the tenure of peasant or freehold proprietorship. Lord Beaconsfield, perhaps, scarcely contemplated such a state of things as exists in the Red River Valley so well described by Mr. Vernon Smith in the *Nineteenth Century* for July last. We read of land in that district which produces from 40

to 50 bushels to the acre, whereas, Mr. Smith shows, 30 bushels to the acre of the first crop clears all outlay up to that time, returns the capital invested, and leaves a first-rate fenced farm in a high state of cultivation for succeeding agricultural employment. So, even if the farmer has purchased his land with borrowed money, it would apparently only be for the first year that the first income above mentioned would have to be furnished by it.

The English Land Transfer Committee have, in their recent Report, made a series of recommendations, which, if carried into effect, will cause a revolution in old-fashioned conveyancing, and produce a state of things more similar to that which exists here and in the other Colonies. They have themselves summarised their recommendations, which include the following: (1) The abolition of the present system of paying for conveyances according to the length of the instrument, and the substitution of a graduated *ad valorem* scale of payments; (2) the compulsory use of short statutory forms; (3) the practical abolition of legal mortgages and deeds of reconveyance, by giving to the holder of a simple charge on land all the remedies at present possessed by the holder of a legal mortgage, either with or without a power of sale (as the parties may desire), and by providing that upon the endorsement on the charge of a memorandum signed by the party entitled thereto, stating that all the moneys due thereon had been satisfied, the charge itself, should *ipso facto*, determine; (4) the appointment of a real representative to the deceased owner of land having the same control over, and power to make title to, freeholds, which a personal representative now possesses in regard to chattels real:—this was urged or approved by every witness examined by the Committee.—(5) The repeal of the Statute of Uses. As to this the Committee report: "Among the various pitfalls for the unwary presented by statutes providing for a state of things which has long since passed away, few have led to more expense or litigation than that stronghold of conveyancing pedantry the Statute of Uses. Your Committee see no reason why it should not at once be repealed." (6) The establishment in England and Wales of district registers of assurances affecting land; (7) the enactment that (except in case of actual fraud on the part of the party registering) every instrument shall rank in priority according to the date of its registration; (8) the localization of the registration of titles, as far as practicable, concurrently with the establishment of district registries for the registration of assurances.

The Committee further report as follows:—

"Your Committee have considered whether the period of commencement of a title which a purchaser under an open contract may require, at present fixed at forty years, might not, in view of the recent Statute of Limitations, be still further shortened. But, as the term in question depends not only upon the time during which claims against land may be kept alive, but upon the estimated duration of human life, during which such claims may remain in abeyance, they believe that such an abridgement cannot be made as long as the rights of reversioners and other persons having future interests are, for the purposes of the Statute, held only to arise when they fall into possession. Whether the latter rule might not be advantageously altered they consider to be a matter for grave consideration." The Committee appear to speak with approval of the Australian system, whereby the title to all land, in-

stead of resting upon an instrument of, perhaps, difficult construction or doubtful validity, starts with an unimpeachable grant from the Crown, following upon an official survey. They, however, are of opinion that it would not be safe to press the analogy between conveyancing in England and conveyancing in the Colonies too far, and state that the universal registration of unimpeachable or absolute titles, which has been found perfectly easy in Australia, would, it is admitted by the strongest advocates of registration in England, be simply impossible.

NEW YORK STATE BAR ASSOCIATION.

We have received the second volume of the Reports of the above Association, which contains the address delivered by the Hon. Samuel F. Miller, Justice United States Supreme Court, at the opening of the second annual meeting, besides many valuable essays and reports of various committees. The object of the Association, as set forth in its constitution, is "to cultivate the science of Jurisprudence; to promote reform in the Law; to facilitate the administration of Justice; to elevate the standard of integrity, honour, and courtesy in the legal profession; and to cherish a spirit of brotherhood among the members thereof." The constitution provides, amongst other things, for the appointment of a Committee on Grievances which may hear all complaints in writing preferred by any member against any other member for misconduct in his relations to the Association, or in his profession, and also any specific complaint which may be made to them by any member in writing, affecting the interest of the legal profession, the practice of law, or the administration of justice, and may report thereon to the Association. It also provides for the appointment of Committees on Law Reform, and on Legal Biography, the duty of the latter being to provide for the preservation among the archives of the Association of memorials of the lives and characters of distinguished deceased members of the bar of the State. Mr. Justice Miller, in his opening address, makes many interesting observations as to legislation in the United States, as it affects the administration of justice in the courts. After remarking that for the first fifty or sixty years after establishing their independence, the American people were too much occupied in perfecting their political organization to turn their attention to the organization of the courts, the learned Judge proceeds to show that the first innovations made upon the established order of things affected the period of office and mode of appointment of the Judges. The Americans, considering the life tenure of office by Judges as a device adopted in England to protect the judiciary from the influence of the Crown, deemed that now that the people were themselves the Sovereign, Judges should, like other public servants, be made to feel their accountability to their masters; and in most of the States the fundamental law was altered, and Judges held office for short periods, and were elected by the Legislature. "Of all the depositaries of political power in this country," says Mr. Justice Miller, "from the people, to whom the most extended right of suffrage has been given, to the executive, whose power is under least restraint, the legislative bodies, jointly and singly, are the most unfit to be trusted with appointments to office." The system only afforded fresh opportunity for what is called "log-rolling." "Log-rolling" is a term derived from the practice of the early settlers in clear-

ing their farms. They cut the trees into large logs, which were then piled up and burnt. The piling, however, required more force than was at the demand of one farmer, and so the custom was for his neighbours to lend their help, while he, of course, was expected to do the same for them. The application of the metaphor to fraudulent combinations among members of legislative bodies is sufficiently obvious. Against this log-rolling system the efforts of the American people have been, for some time, directed. Amongst the earliest reforms in that direction was the transfer of the election of Judges from the Legislature to the people by popular vote; while, as to the tenure of office, the learned Judge informs us that public opinion has undergone, and is still going through, a very decided reaction, and he expresses his satisfaction that such should be the case. The present state of affairs, as regards the higher courts of the States, is given as follows:—

"There are seven States in which life tenure prevails. In one the term is twenty-one years, in another fifteen, in another fourteen, in three it is twelve, and in two it is ten. In the remainder it is six and eight years, with three or four exceptions. So in regard to the manner of appointment. Three States appoint by legislative election, seven by governors and senates, and twenty-eight by popular election." The writer then proceeds to discuss the merits of the system of electing Judges by popular vote, remarking, however, that in America it has not yet been sufficiently long in operation to form a satisfactory opinion on it, and has, moreover, been adopted almost exclusively in connection with short terms of office "about the evil of which," says he, "there can be no question." He, however, clearly shows his own view to be that this system is a dangerous one, especially in cities where the criminals against whom a Judge must enforce the law, if it is enforced at all, exert a very powerful influence. And, apart from abstract reasoning, he appeals to the mode in which the Federal Judiciary are appointed. These, under the Constitution of the United States, have always been appointed by the President, subject to approval by the Senate. And he expresses his opinion that very few American statesmen, however democratic their general views of government may be, have any wish to adopt for the Judges of the United States, the system of popular election. The way Mr. Justice Miller regards the matter is shown by the following passage:—

"The dependence of the judiciary on the appointing power is not dangerous only when the appointment is by a monarch. It is much to be doubted if dependence on the vote of the populace is any less so, if the power is exercised at short intervals. The passions, the prejudices, the hasty impulses of the people, when brought to bear on the judge, are as likely to be unfavourable to the defence of innocence in criminal prosecutions, and to the establishment of an unpopular claim of private right, as the occasional exercise of that influence by a king or governor."

He, however, says he does not think the question of the source of their appointment so important as a means of securing honesty, capacity and independence among the judges, as stability in the tenure of office, and in the composition of the Court, and reasonable compensation of the judges. And, on the last point, he strongly expresses his disapproval of the niggardly salaries still paid to many of the judges in the States.

The strong leaning of an eminent American Judge, displayed in this address, towards the system existing in

Canada and the mother-country, namely, the appointment of Judges by the Executive and their tenure of office during good behaviour, is interesting. It is especially so to those who remember Lord Dufferin's speech at the opening of the Provincial Exhibition last September. In that great speech, exerting the privilege of moribund personages, it will be remembered, he gave us the benefit of his parting counsel "before he turned his face to the wall." Referring to the independence of the Judges as one of those principles incident to the British Constitution which, though fully recognised and established, might perhaps be overridden in times of political excitement, unless public opinion exerted itself to maintain them absolutely intact, the Governor-General said:

"Notwithstanding what has been done elsewhere, I do not think that the Canadian people will ever be tempted to allow the Judges of the land to be constituted by popular election. Still, on this continent there will always be present in the air, as it were, a ceratin tendency in that direction, and it is against this I would warn you."

Lord Dufferin then proceeded to dwell on the importance of securing high salaries to the Judges, in the same spirit as does Mr. Justice Miller. On this point he said:—

"In order to secure an able Bar, you must provide adequate prizes for those that are called to it. If this is done, the intellectual energy of the country will be attracted to the legal profession, and you will have what is the greatest ornament any country can possess—an efficient and learned justiciary."

We have only had space to dwell upon one small portion of the contents of this interesting volume. There are contained in it many other valuable dissertations of interest not only to lawyers, but to every intelligent man. We may have an opportunity of referring to some of them in subsequent issues.

ARYAN SOCIETY.

The sudden and rapid expansion of historic studies in the middle of the eighteenth century constitutes one of the great epochs in literature, while the introduction of the comparative method, as Mr. Freeman has observed, marks the nineteenth century, like the fifteenth, as one of the great stages in the development of the mind of man. The application of the comparative method has produced, and is producing, great results in three regions of enquiry, namely, language, mythology, and institutions. It is, of course, in the last of these that the lawyer is more immediately interested, although the three are closely connected, and mutually elucidate each other. And in these days of extended ideas some knowledge of the works of Sir H. Maine and other labourers in the same field may almost be said to be a necessary part of a lawyer's education. Enquiry into the institutions of that Indo-Germanic, Indo-European, or Aryan race from which we claim descent, has already displaced many false theories as to the nature of property and the law of persons, has thrown light upon the direction in which true progress lies, and has furnished us with a stand-point, which we would not otherwise have, wherefrom to judge of the real value of those socialistic and communistic schemes which are attracting so much attention in the modern world. For proof of this we cannot do better than refer to an article on Aryan Society in the *Westminster Review* for July last. The writer brings out very clearly the leading facts which modern enquiry has arrived at as to the institution of the Family, which lies at the basis of Aryan civi-

lization, and as to those village communities, which develop out of the Family, and which present the same general features, whether we look for them in India, or among Teutonic and Scandinavian nations. One of his objects is to point out—what is familiar to every student of the Politics—that some of the main results of modern enquiry in this field were anticipated by Aristotle. Sir H. Maine, Mr. Freeman, and the other modern writers referred to in this article, have shown that if we are to gain a true knowledge of the development of civilization and the history of institutions we must follow the course pointed out in the first book of Aristotle's Politics, and commencing with the Family as the basis, trace its expansion into the village community, from which developed the State, whether in the Greek and Italian form of the City or in the later Teutonic form of the Nation. The fallacy of commencing to trace civilization from an imaginary basis resting on contract, as in the "Social Compact" of Locke, and the "Original Contract" of Hobbes, has been exposed, and the stage of contract has been shown to be the latest, and not the first stage of human progress—the transition having been one from Status to Contract. As Sir H. Maine puts it (A. L. p. 169): "Starting, as from one terminus of history, from a condition of society in which all the relations of persons are summed up in the relations of the Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals."

The theory of the origin of property enunciated by Blackstone and others, resting upon the principles of occupancy enunciated by the Roman Jurisconsults, presupposing as they do not joint but separate ownership, has been proved to be false. Joint ownership was the form which property originally universally took, and, in the words of our writer, "recent investigation has made it extremely probable that, so far from the rights of villagers to commonable lands being the result of unchecked encroachments on the manor of the lord, the enclosure of commons and occupation of waste by the feudal lord are often themselves most unjustifiable encroachments on the ancient rights of village communities."

Our ancestors then lived in village communities consisting of an aggregation of families, each family being controlled in its domestic concerns, solely by that Patria Potestas, which is one of the fundamental points in the early organization of society. Hence arose what Sir H. Maine calls the "international" character of ancient law. Ancient law is scanty because it was only intended as a supplement to the autocratic commands of the Paterfamilias. Its principal object is to regulate the intercourse of corporations, each represented by a single head. One consequence of this system of corporate existence was the doctrine of collective responsibility,—in other words the family was held responsible for the acts of its individual members. As the writer of the article points out, we may, perhaps, trace a survival of this in legal penalties, like attainder of issue, and in those "social penalties" which are still inflicted on the families of persons guilty of heinous crimes. The lands of the village community appear—as in its modern Indian counterpart—to have been usually divided into three parts. First there was the arable land—or the Arable Mark as it is called—in which each householder had a separate lot, which he was obliged to cultivate according to minute rules. Then there were the Pasture Meadows,

the Mark of the township, which though more or less the subject of private occupancy, no family might permanently appropriate. Thirdly there was the waste land or Common Mark, held by the whole community *pro indiviso*. Private proprietary right in the arable land was never admitted. Traditions remain of customs which are still to be observed in Russia and Croatia, of the periodical repartition of lots within the cultivable area, and of the "shifting of the Arable Mark." "As soon as the family lot becomes separate and immovable," says our writer, "the village community is on the way to dissolution."

It was the original intention of the writer in the *Westminster*, as he informs us, to trace the growth of the State out of the village community, exhibiting, in its modern form, the principle of *local contiguity* as a basis for political and social association; a principle which was destined, after passing through many phases, and producing many revolutions, to ultimately supersede the ancient system of blood-relationship as the bond of civilised society. It was, then, his wish to give some account of the growth and history of some of the leading institutions of the Aryan race, of Sovereignty, for instance, tribal, imperial, and territorial, of Nobility, and of Slavery. It is to be hoped that, in a subsequent article, he will find space to complete his scheme. He has, at all events, fully justified his statement that it is impossible fully to understand either the constitutional history, the political system, or the Common Law of England without at least some knowledge of the primitive institutions of the Aryan race.

F. L.

SELECTIONS.

POPULAR KNOWLEDGE OF LAW.

It is often said, and we fear with too much truth, that no people are so ignorant of the laws of their country as the English. The most strange absence of knowledge of elementary legal principles may be met with even among persons of considerable general information, and no one is ashamed to admit a want of acquaintance with special laws, although they may affect the most ordinary human relations. It is an old story how often novelists and playwrights go astray when they bring the law into the working out of their plots. Some one has said that such authors should always keep a legal adviser at hand to save them from the mistakes into which they are so liable to fall. One of our most popular novelists, who is distinguished by the range and accuracy of his knowledge of common things, published a story a few years since in which his hero, an ex-Solicitor-General, commits suicide because, in forgetfulness of a well-known statute, he thought a large property had been left away from his wife which, in fact, descended to her absolutely. Still more recently our interest has been invited to a trial for bigamy in which, in defiance of all principle, the chief witness against the man charged with the offence is the woman with whom his first marriage was said to have been contracted. It is almost an every-day occurrence for newspapers to report the refusal of a magistrate to hear evidence from the first husband or wife, as the case may be, in a charge of bigamy; yet we are favoured with a very clever report of a trial at assizes, in which this objection seems to have occurred to neither Judge nor counsel. When the opportunities of obtaining information are so ample, the lack of of it is all the stranger. In no country are the proceedings of the Court chronicled from day to day with such fidelity and completeness as with us, and nowhere, as it would seem, are they so little turned to account.

It is the dream of many that the study of the law will one day become again what it was accounted in bygone genera-

tions—a necessary part of a liberal education. It is certainly strange to read the details showing how three centuries since noblemen and gentlemen frequented the Inns of Court, in even greater numbers than they frequented the Universities, for the simple purpose of learning something of the laws of the country they might have a share in governing. Since then knowledge of law has become a strictly professional accomplishment, and it will not again become a branch of popular education until the law has been made at once simpler and more scientific in its conceptions and procedure. The efforts of law reformers are directed to these ends; but while we await these great results in the future, we know not why opportunities that are now open to all should be neglected as they are. A criminal trial excites attention through an apparent fascination in crime; why should not the adjudication of civil rights have an attraction of its own as connected with the organization of men in society and the attributes of property in the material objects of possession? —*Times.*

PASSING OF PROPERTY OBTAINED BY FRAUD.

The Court of Queen's Bench Division, on the first day of the present sittings, had, in the case of *Babcock* v. *Lawson*, to discharge the disagreeable duty of deciding which of two innocent parties should suffer the consequences of a fraud practised upon both. The circumstances of the case made it *sui generis*, otherwise the law relating to the subject was so thoroughly thrashed out in the recent case of *Cundy* v. *Lindsay* that were it not for this the action would no doubt never have been brought. In *Cundy* v. *Lindsay* (38 L. T. Rep. N. S. 574), which came before the House of Lords upon appeal from a decision of the Court of Appeal reversing the decision of the Court of Queen's Bench, the facts were as follows:—A person of the name of A. Blenkarn wrote to the respondents and ordered goods of them, intentionally signing his name in such a manner as to be mistaken for Blenkiron. There was a respectable firm of that name, and the respondents, believing that they were dealing with that firm, forwarded the goods to Blenkarn. Blenkarn had no means of paying for the goods. The appellants afterwards purchased the goods *bonâ fide* from Blenkarn. Held (affirming the judgment of the court below), that the property in the goods had never passed from the respondents, and that they were entitled to recover the value of them from the appellants. In giving judgment the House of Lords laid it down that, in the application of this principle, the settled and well-known rules of law must be rigorously applied, and, with regard to the title to personal property those rules were expressed as follows:—The purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchase the chattel in market overt, he obtains a title which is good against all the world; but if he do not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professes to sell it, the purchaser will not obtain a title as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract, that is to say, a contract which has purported to pass the property from the owner to him, then the purchaser will obtain a good title, even though afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it and to set it aside, because those circumstances will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained. In this case the court held that this was not one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside on the ground of fraud, but a case in which the contract had never come into existence, and accordingly that the property had never passed from the respondents. In a subsequent case that of *Moyce* v. *Newington* (39 L. T.

Rep. N. S. 535) the contract between the vendor and the fraudulent third person was held to have passed the goods. In that case the plaintiff purchased some sheep in an open market recently established under a local Act, paid a fair price for them, and removed them to his farm. The person from whom he purchased them had obtained them just before from the defendant for a cheque upon a bank which had no account in his name; but plaintiff knew nothing of this. When the cheque was dishonoured the defendant took criminal proceedings against the drawer, and afterwards got him convicted for obtaining the sheep under false pretences. On the day before the conviction the defendant, with a policeman, removed the sheep from the plaintiff's to his own farm, and the plaintiff now brought this action to recover them. The court held that the plaintiff was entitled to recover, holding it to be settled law, that, though a seller is induced to sell by the fraud and false pretences of the buyer, and though it is competent to the seller by reason of such fraud to avoid the contract, yet till he does some act so to avoid it, the property remains in the buyer; and that if he, in the meantime, has parted with the thing sold to an innocent purchaser the title of the latter cannot be defeated by the original seller.

These two cases illustrate clearly the principles which relate to the passing of property obtained by fraud. In the first there was no actual passing of property from the original vendor to the fraudulent third person, so that he could not give a good title to it to the defendant; in the second there was an actual passing of the property and the contract not having been set aside before sale to an innocent vendee the latter was held entitled to keep it. The present case of *Babcock* v. *Lawson* differed considerably in the facts from both these, though the principle upon which they were decided was held equally applicable. The plaintiffs, who are merchants at Liverpool, had lent to another firm of merchants there, their acceptances for the sum of £11,500, on the security of a certain quantity of flour, under a memorandum addressed to the plaintiffs in these terms:—"As security on our part we have warehoused in your name certain lots of flour, and in consideration of your delivering it to us or our order as sold, we undertake to pay you proceeds of all sales thereof on receipt." The plaintiffs paid their acceptances as they became due, and had paid them to the amount of nearly £7,000, and, in the meantime the borrowing firm applied to the defendant to advance them the sum of £2,500 on the security of 1,500 sacks of the flour, which he agreed to do, not knowing that it had already been warehoused as security to the plaintiffs, and stipulating for absolute possession of the flour, and for the power to sell it. In order to give such possession the borrowing firm brought to the plaintiffs a note stating that they had sold to the defendant the 1,500 sacks of flour, the proceeds of which they engaged to pay to the plaintiffs; and thereupon the plaintiffs gave them a delivery order, under which the flour was delivered to defendants, who thereupon advanced the £2,500, and then sold the flour in the Liverpool market for £2,647. The borrowing firm paid only £500 to the plaintiffs, who, being unable to obtain more of the proceeds, sued defendant for the value of their property on the ground that the transfer had been obtained from them by fraud. The court gave judgment for the defendant on two grounds. Assuming—as to which they had doubt—that the contract conferred on the pledgees a special property in the flour, and gave them more than the mere custody, so that they might know of a sale, this was subject to the right of the pledgors to have the flour given up to them on their finding a purchaser, for the purpose of a sale by them as owners without any intervention by the pledgees, and the flour having been surrended intentionally, and the possession parted with, the contract of pledge was, for the time being, at an end. The transaction might as between the pledgor and the pledgee have been revoked as obtained by fraud, so long as the flour remained in the hands of the pledgors; but when, prior to any such revocation, the property in the goods had been transferred by the owners for good consideration to a *bonâ fide* transferee, the defendant, the latter acquired an indefeasible title, and on this ground alone he was held entitled to judgment.

The court thought that the fact that the flour, having been parted with by the plaintiffs with a view to its being sold had been pledged instead, made no difference, inasmuch as it having become revested in the pledgors by the act of the pledgees, the former were as competent to dispose of the goods by way of pledge as by way of sale; and, further, that it would make no difference if the money was advanced by the defendants before the flour was actually delivered.

The court stated also that there was another ground upon which they were of opinion that the defendant was entitled to judgment. That was, that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. Here the borrowers were allowed by the plaintiffs to appear as the ostensible owners of the flour, and to exercise uncontrolled dominion over it. It would therefore be unjust and inequitable that the defendants, who had innocently advanced money on the flour in the ordinary course of commercial dealing, should be sufferers through the improvident conduct of the plaintiffs with the borrowers, or their want of proper caution.

In the case of *Moyce* v. *Newington* the Lord Chief Justice stated that in the American courts the preference given to the right of the innocent purchaser when a contract fraudulently obtained has not been avoided by the original vendor, is treated as an exception to the general law, and as resting on the above principle that where one of two innocent parties must suffer from the fraud of a third the loss shall fall on him who enabled such third party to commit the fraud, and observed that he should rather prefer to accept that view than the reasoning on which the conclusion is based in our own text writers. *Babcock* v. *Lawson* cannot fail to be regarded as an important case as settling a point of law which at first sight does not clearly appear to be settled by previous decisions.—*Law Times.*

O'Brien's Division Courts Manual: Second Edition. Willing & Williamson: Toronto.

We have been favoured with advance sheets of this work. The well-known ability of the author (who is editor of the Law Journal), and the acknowledged usefulness of his first edition, led us to expect much from this edition, for he entered upon an enlarged field. He has not disappointed us, but has occupied it well. The legislation which has taken place since Mr. O'Brien first annotated the Division Courts Acts, as set forth in the Consolidated Statutes of Upper Canada, chapter 19, and afterwards the Replevin Act, and subsequent Acts, giving jurisdiction to Division Courts, required a new effort, which Mr. O'Brien has put forth well. The amended Division Courts Act of the late Hon. John Sandfield Macdonald, giving the right to garnish debts, required an entire recast of rules and forms. These were framed and settled by the Board of County Judges in July, 1869. Then the revision of the Statutes brought the whole of the enactments into one Act. A second edition of Mr. O'Brien's work was thus a necessity, and the performance does the learned author infinite credit.

There is a careful annotation of almost every provision in the Statutes we have referred to; also of the Replevin Act. The Fence-Viewers' and Water-courses Acts, the Act respecting Education, and the Act respecting Public Schools, in so far as they confer jurisdiction on Division Courts, are also annotated: and there are added chapters on prohibition, certiorari, and mandamus. Supplementary rules and forms of the Judges, with annotations and useful hints to practitioners, are given to officers of the Courts and suitors. An appendix of new forms is added to those framed by the Judges, which will be found to supply a felt want in many respects.

The printing is in clear type, on fair good paper, and the work as a whole is a very creditable Canadian Law Book, reflecting well on the learning and care of the painstaking Editor and those who have assisted him, as well as on the publishers who have executed the mechanical department.

Mr. O'Brien's long acquaintance with these Courts, which his position as Editor of the "Canada Law Journal and Local Courts Gazette" has given him, has peculiarly fitted him for this work. —*London Free Press.*

CANADA REPORTS.

SUPREME COURT OF CANADA.

Crysler v. McKay et al.

This was an appeal, by the defendants, from the judgment of the Court of Appeal for Ontario, dismissing an appeal from a decree of the Court of Chancery. The bill was filed to recover possession of certain lands in the Township of Winchester, the plaintiff claiming title under a tax sale in 1855. The defendants set up that the tax sale was invalid, owing to five years' arrears of taxes not being due when the sale took place; in which view they were sustained by the majority of the court, who allowed the appeal. Several important questions with regard to the validity of tax sales were discussed in the course of the argument, and in the judgments of the learned judges, amongst whom there existed considerable diversity of opinion. We print below the judgment of Mr. Justice Gwynne *in extenso;* it will be found to give an able and exhaustive discussion of a point of great interest and difficulty, viz.: the interpretation of the various statutes passed with a view to remedying defects and irregularities in the proceedings connected with the tax sales. The main scope of the judgment (which was delivered in June last) is to enforce the view held by the learned judge and concurred in by a majority of his colleagues, that the 156th section of the Assessment Act of 1866, corresponding to the 155th section of 32 Vict., cap. 36, Ont., does not make, by lapse of time, a deed upon a tax sale good, when there were no taxes in arrear for the period prescribed by statute before a sale is authorised.

Gwynne, J.—One of the points pressed upon us by the learned counsel for the respondent was, that the 156th section of the Assessment Act of 1866, made the deed under which the plaintiff claims, which was executed by the sheriff upon the 23rd of May, 1857, in pursuance of a sale had in March, 1856, wholly unimpeachable, even though no portion of the taxes for the alleged arrears of which the sale took place, had been due for five years, or even though there was no amount of tax whatever due at all in respect of the land sold. As some of my learned brothers adopt this view, it may be convenient that I should express my opinion upon this point first, before adverting to the ground upon which the court below has based its judgment.

The fair and legitimate conclusion resulting from the judgments of all the Courts in Ontario, upon the construction of the Assessment Acts, both before and since the first enactment of the section referred to, according to my understanding of the reported decisions, is that the section can only be construed to remedy all irregularities and defects existing, when the event, the happening of which, the statute has made an essential condition precedent to the creation of the power to sell, has occurred, namely, when some portion of the taxes imposed has been suffered to remain in arrear and unpaid for the prescribed period, which was formerly five years but now three; and that it cannot be construed as supplying the want of that condition precedent to the creation of the power to sell. Sitting as we do here as a Court of Appeal from the Courts in Ontario, speaking for myself, I must say that if I should find a judgment of any of those Courts affirming the position contended for, I should feel it to be my bounden duty to raise my voice for reversal of such a judgment; as one which would be, in my opinion, subversive of all security for property—at variance with the plainest principles of justice—contrary to the whole scope, object and tenor of the Act in which the clause is found, and one which can only be arrived at by disregarding the elementary rule for the construction of all statutes, namely, that the construction is to be made of all parts together, and not of one part only by itself. In *Hall* v. *Hill*, in the Court of Error and Appeal in 1865, 2 Er. Ap. Rep. p. 374, Richards, C. J. delivering the judgment of the court says: "The Courts in this country have always held that the imposition of taxes on wild lands, and the selling those lands for the arrears of such taxes with the additions and accumulations to the amount of taxes which the Acts require, in effect work a forfeiture of the property of the owner of the lands. In relation to statutes of this class, Turner, L. J., in *Hughes* v. *Chester & Holyhead Railway*, says: this is an Act which interferes with private rights and private interests, and ought therefore, according to all the decisions on the subject, to receive a strict construction so far as these rights and interests are concerned. This is so clearly the doctrine of the court that it is unnecessary to refer to cases upon the subject; they might be cited almost without end."

In that case, in the Court of Queen's Bench, 22 U. C. 584, Draper, C. J. referring to the Assessment Act, when pronouncing the judgment of the court says: "We must confess, we more readily concur with what was said in *Doe* v. *Reaumore*, 3 O. S. 247, the operation of this statute is to work a forfeiture; an accumulated penalty is imposed for an alleged default and to satisfy the assessment charged together with this penalty, the land of a proprietor may be sold, though he may be in a distant part of the world and unconscious of the proceedings. To support a sale made under such circumstances, *it must be shewn that those facts existed which are alleged to have created the forfeiture, and which are necessary to warrant the sale.*" In *Payne* v. *Goodyear*, 26 U. C. p. 451, Draper, C. J. says: "The primary, it may be said *the sole*, object of the Legislature, in authorising the sale of land for arrears of taxes, *was the collection of the tax.* The statutes were not passed to take away lands from their legal owners; but to compel those owners who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorised, to pay, by the sale of a sufficient portion of their lands;" and again at p. 452, the *power* to sell land *was created in order to collect the tax.* In *Connor* v. *Douglas*, in the Court of Appeal, 15 Gr. at p. 463, Richards, then C. J. of the Court of Common Pleas (the Court of Appeal then consisting of all the Judges of the Superior Courts), referring to the above language of the court in *Doe* v. *Reaumore*, draws a distinction between matters of procedure and other matters thus: he says: "The judges could not have intended their language to apply to a mere defective or informal advertising of the land"—"the language referred to," quoting *Doe* v. *Reaumore* as above, he goes on to say, "may well apply to all these matters creating a charge on the property; fixing, as it were, the burden on it, and rendering it liable to be sold, when the charge has once been fixed on the land, *and the period* has elapsed after which it may be sold; then the subsequent matters as to how it may be sold, the manner of selling, advertising, &c., to a certain extent cease to be mandatory, and are in fact but the mode pointed out by the statute *how* the property is to be sold, *which by all the requirements of law*, before the officer was directed to sell it, had been made liable to sale," and referring to the judgment of the Court of Common Pleas in the then recent case of *Cotter* v. *Sutherland*, he says at p. 464, "I think the language used by my brother Adam Wilson, in *Cotter* v. *Sutherland*, in the Common Pleas, is correct, and may be properly applied and laid down *as the rule* in those cases, viz.: We should require strict proof that the tax has been lawfully made, but in promoting its collection, we should not surround the procedure with too unnecessary or unreasonable rigour;" and again he says: "I would refer to the language used by the learned judge from pages 405 to 408 inclusive; the conclusion aimed at is that, under these Acts, there are certain things which must be strictly adopted, otherwise the whole proceeding following them must be void—there must have been an assessment in fact—and made by the properly authorised body—the writ must be directed to the sheriff and be returnable at the time named." And again, these are essential "elements in the constitution of any valid tax sale—there must be charges rightly created on the land—there must be a power rightly conferred upon the sheriff to sell it—the sale must not be without some reasonable and sufficient notice, nor sooner than he is authorised to sell; nor otherwise than by public auction." The learned Chief Justice then, while concurring in the above language, guards himself from being supposed to hold that there may not be in some instances, some other ingredients required, than those stated, to make the sale valid. Draper, C. J. with whom Mowat, V. C. concurred, repeated his opinion that the Tax Sale Acts are to be treated as penal in their character, leading to forfeiture, and that therefore they should be construed strictly. We have in this judgment an affirmation by the Court of Appeal of the views expressed by the Court of Common Pleas, in *Cotter* v. *Sutherland*, with the single exception that whereas the Court of Common Pleas did not incline to regard the Tax Sale Acts as of a penal character, the Court of Appeal seemed to regard them in that light. However, Mr. Justice Wilson delivering the judgment of the Court of Common Pleas, in *Cotter* v. *Sutherland*, 18 C. P. Ap. 389, affirms the law imperatively to be that the owner must be a defaulter for the prescribed period of years before his land can be sold. He regards the lawful imposition of the tax as creating a judgment debt, to satisfy which alone the law authorises a sale. In either view of the statute, namely, whether it be regarded as penal or as creating a debt in the nature of a judgment, the Acts sanction no sale, except to realize arrears of taxes actually imposed, some portion of which has been suffered to remain in arrear for the prescribed period. We have here then the clearest judicial enunciation of the scope object and intent of those Acts.

In *Hamilton* v. *Eggleton*, 22 C. P. 536, the Court of Common Pleas held that sec. 155, of 32nd Vict. ch. 36, which is identical with sec. 156, of the Assessment Act of 1866,

does not make valid a deed executed upon a sale as for taxes in arrear, when, in fact, no taxes were in arrear at the time of the sale. In a matter which appears to me of such great importance, I may be excused for referring to a portion of the reasons given for that judgment, although it was pronounced in my own language, with the full concurrence, however, of my brother Judges. After pointing out the several clauses of the Assessment Acts, and shewing their scope to be, as laid down by other Judges in the cases which I have here quoted above, the judgment proceeds: "The whole object of the Acts, and the whole machinery provided, being for the purpose of enforcing the payment of arrears of taxes, and the only authority to sell conferred by the Act being in case of there being such arrears due out of the land and unpaid, there can, I think, be no doubt that the 155th sec. of 32 Vict., corresponding with the 156th sec. of the Act of 1866, relates only to deeds given in such cases as were in pursuance of a sale contemplated by the Act, namely: a sale for the purpose of realizing payment of taxes in arrear and unpaid; the only deed authorised to be given, being a deed in pursuance of a sale which was authorised only in the event of there being taxes in arrear and unpaid, the natural construction is, that this 155th section, like all other parts of the Act, relates to the like object, namely: that which the Act authorised, not to an event not at all authorised or contemplated by the Act, viz: a sale of lands in respect of which there were no arrears of taxes due, the owner of which had never been in any default which called for or justified the intervention of the Act. The object of the clause relied upon, in my opinion, was, as its language appears to me plainly to express, and as is consistent with the whole tenor of the Act, to provide that, when lands became liable to be sold for arrears of taxes, and were sold to recover such arrears, a deed should be given in pursuance of such sale. Such deed should not be questioned for any irregularity or defect whatever unless within a prescribed period; but it would be contrary to the whole scope of the Act" (which it is to be borne in mind was merely an Act to amend and consolidate the several Acts respecting the assessment of property) "to hold that the object of the clause was to make good after a period of two years, a deed given under circumstances in which the Act had not authorised or contemplated any sale at all taking place, in which, in fact, the very purpose for which alone a sale was contemplated was wanting." In that judgment, attention was also drawn to the provisions and effect of an Act, 33 Vict. c. 23, to which, however, I propose now to draw more particular attention.

That Act was passed for the express purpose of making valid sales known to be absolutely invalid, and it enacted that: In cases where lands which were liable to be assessed had been sold and conveyed under colour of the statutes, for taxes in arrear, and the tax purchaser at such sale had, prior to the 1st day of November, 1869, gone into and continued in occupation of the land sold or of any part thereof, for at least four years, and had made improvements thereon to the value of $200, or in lieu of such occupation, shall have paid at least, eight years' taxes charged on the land since the sale, such sale should be deemed valid, notwithstanding any omission, insufficiency, defect, or irregularity whatsoever as regards the assessment or sale, or the preliminary or subsequent steps required to make such sales effectual in law; *Provided* always, that the statute should not apply among other cases, to the following, namely: In case the taxes for non-payment of which the lands were sold had been fully paid before sale; and it was further enacted that nothing in the Act contained should affect the right or title of the owner of any lands sold as for arrears of taxes, or of any person claiming through or under him, when such owner at the time of such sale was in occupation of the lands, and the same has since been in the occupation of such owner or of those claiming through or under him. Now, is it conceivable that the Legislature would have passed this Act, so passed for the express purpose of making invalid sales, valid, but which excluded from its operation the case of there being no taxes in arrear at the time of the sale, which was the case of *Hamilton* v. *Eggleton*, and the case of the true owner continuing in occupation from the time of the sale, and which, in cases in which it did operate, only made valid sales which had been followed by actual occupation by the tax purchaser for the full period of four years, accompanied by an outlay of $200 in improvements, or in lieu of such occupation by the payment of taxes accrued due for eight years subsequent to the sale; if there was then a statute in existence having the effect as is now contended (for this is the bald contention), that even in a case where the owner of property may have continued in possession, regularly paying all taxes both before and since the sale, and where consequently no taxes whatever were in arrear, nevertheless, if in such case a sale should take place and a deed be given, as occurred in *Hamilton* v. *Eggleton*, the mere lapse of four years from such wrongful and inexcusable sale should divest the true owner of his property, although he had never been in default, and may have had no knowledge whatever of the sale until, after the lapse of the four years, the purchaser at such invalid sale

should proceed to evict him? To my mind, I must confess that this statute appears to involve a legislative recognition that the Assessment Act of 1866 is not open to the construction contended for.

What a state of society would ours be—what a reproach would it be, not upon our system of jurisprudence only, but upon our state of civilization, if we should be obliged judicially to declare that such is the frail tenure upon which property and civil rights are held in the Province of Ontario? Let us consider for a moment longer the proposition contended for, that we may be thoroughly familiar with the aspect of the proposition which is asserted in the name of an Act of the Legislature. Lands are liable to assessment whether they are resided upon or not. Those not resided upon, when the owner is not resident within the municipality (or is unknown if residing within the municipality) are assessed upon a separate roll called the "Non-resident Land Roll." Those upon which the owners reside are assessed against the resident owners personally. Now as to the latter class, first. He may pay his taxes regularly to the proper officer every year—may carefully preserve all his receipts. He may never have been in default at all, and yet, as in *Hamilton* v. *Eggleton*, his land may be sold behind his back without his knowing anything about it; he may continue in possession after the sale, paying his taxes regularly as before, until after a number of years he finds he is no longer the owner of his own land, the fee simple estate therein having, as is contended, passed to a stranger by the mere lapse of two years now—formerly it was four years—from the committal by a municipal officer of an unwarranted act which is called "a Sale under a Power." This may be done without any notice whatever to the owner, for as advertisement of the sale is part of the procedure only, and as the clause (according to the contention and as conceded) cures all defects in procedure, the sale may have taken place without having ever been advertised and without the owner, who was in no default, having ever had any notice whatever that his land was about to be or had been offered for sale. Then, the owner of lands assessed upon the Non-resident Land Roll knows that the law permits him to suffer the taxes upon his land to fall in arrear now for three years, formerly it was for five years, subject merely to the payment by him for that accommodation of compound interest at ten per cent. per annum. Knowing this to be the law, and in perfect confidence in its integrity he makes his arrangements accordingly—his business takes him abroad for three years. He returns before the expiration of the third year, in time to pay up all arrears with the accumulated interest within the period prescribed by the law, and he finds that immediately after he left the Province his whole property consisting of a valuable estate had been offered for sale without any authority of law by a municipal officer as for one year's taxes due before he left, when in fact none was in arrear, and that a deed had been executed by the municipal officer to a stranger, and that more than two years have elapsed since the sale and he is told by the courts of law where he seeks redress that his case is helpless—that notwithstanding he was never in default, and that the act of the municipal officer was inexcusable and unwarranted, still the lapse of two years from the committal of that unwarranted act has had the effect of divesting him of his estate and of vesting it in the person to whom the municipal officer so wrongfully, and without any legal authority, had executed a deed purporting to convey it. Surely if ever there was a case in which judicial astuteness should, if necessary, be called into action to avoid such a construction, it is this; but, in my opinion, no astuteness is necessary, for the proposition seems to my mind to be so shocking that I never could feel myself to be justified in imputing to the Legislature an intent so arbitrary—so subversive of civil liberty and of the right of the subject to the full enjoyment of his property, as such a construction would imply, unless I should find the intent expressed in language which admits of no other possible construction, and from which there is no possibility of escape. But it is said that unless this construction be given to the Act the maxim of law "*omnia presumuntur rite esse acta*" would be disregarded. The clause relied upon and other similar clauses in other Assessment Acts, form the best commentary upon the inapplicability of such a maxim; for it was the repeated illegal acts committed by the public officers in the conduct of those sales which formed the sole excuse for the enactment of those clauses. However, the rights of property are too sacred to be left to the mercy of this maxim, which never claimed to apply to the giving jurisdiction to deprive a man of his estate. Even in the case of a sale under an execution issued out of the Superior Courts it is necessary that there should be a judgment obtained against the owner of the land in order to support a transfer of his estate under the execution. Here the contention is that neither a judgment nor anything analogous to it is necessary. The maxim, too, only purports to operate "*donec probetur in contrarium*," whereas the construction sought to be put upon the Act, in which the clause in question is found, asserts the right to pass an estate by the mere lapse of two

years from the committal of an act *proved* or *admitted* to have been at the time it was committed, illegal and wholly unwarranted. If this construction should be established, the first fruits of that decision would be to divest the true original owner of the land, which was the subject of litigation in *Hamilton* v. *Eggleton*, of his estate which the judgment in that case, so long as the construction it put upon the Act is maintained, secured to him, for the action there having been ejectment it is not final, and the party who there claimed under the wrongful deed may bring a new action and recover the estate from the rightful owner if a new construction should be put upon the Act by this Court.

Again it is said that, in these cases, the innocent purchaser should be protected, but I cannot see that he, however innocent, has any greater claims upon our sympathy than the innocent owner of the property, who would be cruelly wronged if the purchaser in the given case should succeed. In a matter so affecting the rights of property there is something more to be considered than which party is most entitled to our sympathies. That is a question with which we, as expounders merely of the law, have nothing to do. What the owner of the property submits to our jurisdiction is—whether or not the language used by the Legislature warrants the construction that the mere lapse of two or four years from the committal by a municipal officer of an utterly illegal and unwarranted act (whether such act was fraudulent, or only done in ignorance, or by mistake is all one to the owner) can have the effect of divesting the true owner who was in no default whatever to the municipality, and who had been guilty of no breach of any law, of his estate in real property.

In *Proudfoot* v. *Austin*, 21 Gr. 566, the plaintiff, who was a purchaser at a tax sale, rested his case upon the Sheriff's deed alone. Blake, V. C., held this to be insufficient, and that the 155th sec. of 32 Vict. ch. 36, only applies where there was an arrear of taxes at the time of sale; *and, where* there has been an actual sale—he adds—"I think, therefore, that the plaintiff should have shewn that at the time of the sale there were some taxes due *and* that an actual sale did take place," and he remitted the case for further evidence. This sentence extracted from the learned Judge's judgment by no means implies that he was of opinion that it was not necessary that some part of the arrears should be due for the period prescribed by the statute, he was simply adjudicating that the Sheriff's deed alone was not sufficient, but that proof of arrears of taxes *and* of an actual sale for such arrears under the provisions of the statute was necessary to be given.

This judgment is no more authority for the contention that an arrear, for any shorter period than the statute had prescribed, would be sufficient than is the expression in the judgment of the court in *Hamilton* v. *Eggleton*, viz.: That the section refers "only to cases of deeds given in pursuance of sales where *some* tax upon the land sold was in arrear."

When the evidence should be offered, would arise the question whether what was offered was sufficient. Upon this point I have referred to the records of the court in *Proudfoot* v. *Austin*, and I find that, upon the 11th and 25th of June, 1875, the Vice-Chancellor took the further evidence which his judgment at the hearing had directed to be given, and that then the treasurer of the county produced the several collectors' rolls for the years 1852, '53, '54, '55, '56 and '57, shewing arrears of taxes charged upon the lands for each of those years to the respective amounts, following in the order of the years, and which still remained due when the sale took place in 1858, viz.: £1 9 5½; £3 6 7½: £4 7 4½; £19 5 7½; £18 18 5½; and £19 7 2, and it was upon this evidence and evidence of the sale that a decree was made in favour of the plaintiff, upon the 28th of June, 1875.

In *Kempt* v. *Parkyn*, 28 C. P. 123, the Court of Common Pleas held that the section under consideration did not cure the defect, that no part of the tax was in arrears for the period prescribed by law, viz.: 5 years in that case before the treasurer's warrant, under which the sale took place issued.

In the case now in review before us, Mr. Justice Patterson delivering the judgment of the Court of Appeal says, that he does not wish to throw any doubt upon the construction, thus put upon the clause in the Court of Common Pleas, although he might have had some hesitation in arriving independently at that reading of the words, "sold for arrears of taxes"—he adds, however, language amply approbatory of the decisions as just and sound. He says, and this is the language of the court, "I see nothing objectionable in principle nor unreasonably restrictive of the beneficial operation of the clause, in holding that while it cures defects in procedure, either in the formal assessment of the land or in the steps leading to, and including, the sale, its operation is excluded when it appears that the substantial basis of liability on the fact that a portion of the tax on the land had been overdue for the period prescribed by the law, under which the sale took place, is wanting."

This language involves a complete affir-

mation by the Court of Appeal of the judgment in *Hamilton* v. *Eggleton*, and *Kempt* v. *Parkyn*; for if the construction which, in those cases, is put upon the section is "unobjectionable in principle," and is not unreasonably restrictive "of the beneficial operation of the clause," then the canons of construction imperatively direct that this construction which is reasonable, wholesome and unobjectionable in principle, must be preferred to a construction such as that now contended for, which is unreasonable, unjust and mischievous in the extreme, inasmuch as it would without, any shadow of reason, deprive a man in no default whatever, and guilty of no breach of any law, of his legal rights in real property without any value or consideration whatever.

In *Nicholls* v. *Cumming*, reported in the 1st vol. of the reports of the judgments of this court, I find language relating to this same Assessment Act, confirmatory of that quoted from the several cases which I have above referred to, and conclusive as it appears to me, upon the clause now under discussion. The question there arose under the 61st sec. of this Act, 32 Vict. ch. 36, which enacts that the Assessment Roll as finally passed by the Court of Revision, and certified by the clerk as passed, "*shall be valid and shall bind all parties concerned, notwithstanding any defect or error committed in, or with regard to such roll.*" Upon the roll so passed and certified, a party appeared to be assessed for $43,400 00, who had had delivered to him an assessment slip, stating his assessment to be only $20,900.

It was contended that this 61st section made the roll, as passed, binding, and conclusive upon the party. I find, however, at p. 419 of the report, this language in the judgment of the court, "I think it more consistent with justice that the fundamental rule which ought to prevail is, that the provisions that the Legislature has made to guard the subject from unjust or illegal imposition, should be carried out and acted on." And again, at p. 422, "When a statute derogates from a common law right and *divests a party of his property* or imposes a burthen on him, every provision of the statute beneficial to the party must be observed; therefore it has been often held that Acts which impose a charge or a duty upon the subject, must be construed strictly, *and it is equally clear that no provision for the benefit or protection of the subject can be ignored or rejected.*" And again at p. 427: "It needs no reference to authorities to authorise the proposition *that, in all cases of interference with private rights of property in order to subserve public interests, the authority conferred by the Sovereign (here the Legislature) must be pursued with the utmost exactitude, as regards the compliance with all pre-requisites introduced for the benefit of parties whose rights are to be affected.*" And the court held accordingly that the 61st section applied only when pre-requisites ordained by previous clauses had been complied with. This case as it appears to me, if it stood alone, ought to be conclusive authority in this court, that the essential pre-requisite which the statute ordains shall occur before the power to sell conferred by the statute comes into being, should occur to enable the clause in question to apply—that the coming into existence of the power to sell, under the conditions prescribed in the statute, is an essential element in every deed authorised or confirmed by the statute.

But it is said that the judgment of the Court of Appeal in *Jones* v. *Cowden*, 36 U. C. 495, is at variance with, and that, therefore being the judgment of a Court of Appeal it in effect reversed, the judgment in *Hamilton* v. *Eggleton*. If that were the effect of the judgment in *Jones* v. *Cowden*, it ought, in my opinion, to be reversed here, for the reasons which I have already given, but in truth *Jones* v. *Cowden* has never been regarded as at variance with *Hamilton* v. *Eggleton*, or as an adjudication upon the point now under discussion. If it had been, *Kempt* v. *Parkyn* would not have been decided as it was; nor, in the case now under review before us, would the Court of Appeal itself have expressed itself in the terms it has of the judgment in *Hamilton* v. *Eggleton*, and *Kempt* v. *Parkyn*. The court, on the contrary, would naturally have felt itself bound by *Jones* v. *Cowden*, and would have decided this case upon the short point as to the construction of the clause, and have so got rid of the difficulty with which it seems to have been pressed in arriving at the conclusion that there was direct evidence of there having been some portion of tax in arrear for five years, sufficient to support the sale. A reference, however, to *Jones* v. *Cowden* will shew that neither did the point which arose and was adjudicated in *Hamilton* v. *Eggleton*, nor that which arose and was adjudicated in *Kempt* v. *Parkyn*, arise in *Jones* v. *Cowden*. The sale took place in 1839, for arrears of taxes to 1st July, 1837, made up as follows:

200 acres at 1s. 8d per acre, under 59 Geo. 3, ch. 8, sec. 5, road tax 2s. 1d. which for eight years amounted to	£0	16	8
Add 50 per cent. under 9 Geo. 4th, ch. 3. s. 4	0	8	4
	£1	5	0
Then an assessment of 1d. to the £ on 209 acres at 4s. per acre under 59 Geo. 3rd, ch. 7, sec. 3, 3s. 4d. per acre for 8 years	£1	6	8
Add 50 per cent	0	13	4
Total	£3	5	

The evidence was, that the Clerk of the Peace on the 12th July, 1837, certified to the Quarter Sessions, that there was the sum of £3 5s. due on the lot for eight years ending 1st July, 1837. The chairman made an order that a warrant for sale should issue, and the warrant was issued. Wilson, J., in his judgment in the Queen's Bench says: "There is no reason to doubt that the land was actually, though perhaps, not formally, taxed."

Now, as to the £1 5s., that was a tax clearly charged upon the land, being a tax directly imposed by statute. So that the amount was certainly due and for the eight years, whether the 1d. in the £ was properly charged or not. There was no evidence, as in *Cotter* v. *Sutherland*, that it was not. The certificate of the Clerk of the Peace that it was charged upon the land, if not conclusive evidence upon that point, would be sufficient *prima facie* evidence. When the learned Judge says, that *perhaps it was not formally taxed*, he was alluding, no doubt, to his knowledge of the practice which used to prevail rather than to anything in the evidence shewing it not to have been formally taxed. It was, he says, *actually* done. There was, however, no question that the £1 5s for road tax was due and in arrear for the proper time, and the sale did take place to realize the £3 5s arrears of taxes, all of which was certified by the proper officer to have been imposed upon the land, £1 5s of which was completely imposed by statute directly. There was no suggestion that anything appearing in the evidence raised a presumption as, it is contended, the evidence in the case now before us does, that this charge had been paid before the sale. The case, therefore, had all the elements to support a sale, which *Hamilton* v. *Eggleton* and *Kempt* v. *Parkyn* pronounce to be necessary, and for this reason *Hamilton* v. *Eggleton* appears to have been referred to for the purpose of distinguishing it. There were, however, in *Jones* v. *Cowden*, objections taken to the inefficiency of the advertisement of the sale. In the Court of Appeal we have not, unfortunately, the judgment of the Chief Justice Draper, which, although written, appears to have been mislaid. He, certainly, was not in the habit of going out of the way to overrule, or to cast a doubt upon, a judgment of a court upon a point not even necessary for the decision of the case before him, and which, in fact, the evidence in the case before him did not raise. If Blake, V. C., had changed the opinion which he had then but recently expressed in *Proudfoot* v. *Austin*, he surely would have pointedly intimated that change, and he could not have thought it necessary shortly afterwards to take, as he did, the further evidence in *Proudfoot* v. *Austin*, and base his decree upon such further evidence; but that he had not changed his mind, appears from the fact that he bases his judgment expressly upon the ground that it was shewn, sufficiently in his opinion, that at the time of the sale there were taxes in arrear, and as I have already shewn, these taxes were due for the period then required. The judgment of Burton, J., wherein he says, that by reason of the 155th section of the Assessment Act, it was not open to the defendants to impeach the sale by reason of the alleged *irregularities* which were urged against it, must be confined to the objections as to the irregularities in the advertisement of the sale, and cannot be extended to refer to a matter which did not exist, and which, therefore, did not call for adjudication, as the case was argued upon the assumption that there did sufficiently appear to be taxes in arrear for the period necessary to warrant a sale.

I had never heard that the *Bank of Toronto* v. *Fanning*, in Appeal, 18 Gr. 391, was supposed to be an authority in favour of the plaintiff upon the point now before us, until I heard my brother Strong's judgment here to-day; if I had, it would have been easy to shew that it does not affect this case any more than *Jones* v. *Cowden* does. The result is, that, in all the reported cases since the first enactment of the clause under discussion, which have been decided in favour of the purchaser, it was proved that the event, upon the happening of which alone, the power of sale comes into existence, has occurred, and that, in the only cases in which that event did not appear to have occurred, the title of the original and true owner has been upheld. Both authority and principle concur then in laying down the law to be, as this court should take this, the earliest opportunity of affirming it to be, that the section under discussion does not remove an infirmity arising from there not appearing to have been at the time of the sale some portion of the tax due which has been in arrear for the period prescribed by law before the sale—that the section covers all mere defects of form which may have occurred in the procedure to impose an assessment actually charged against the land, and all irregularities and defects in the execution of the power, but cannot, upon any principle of justice be construed to supply or cure the want of that condition precedent, the existence of which is essential to the carrying into execution of the power, namely: that some portion of the tax imposed was in arrear for the period prescribed by law, and was still unpaid at the time of the sale.

The Court of Appeal has held that this condition has been fulfilled in the case before us; it is necessary, therefore, to dispose of that point also.

The plaintiff claimed title under a deed bearing date the 28th May, 1857, executed by the Sheriff of the United Counties of Stormont, Dundas and Glengarry, in pursuance of a sale made by the sheriff on 1st March, 1856, for arrears of taxes alleged to have been due in respect of the piece of land sold up to 31st December, 1854. The years for which these arrears were charged to have become due, were the years 1846. 1847, 1848, 1849, 1850, 1852, 1853, and 1854. The contention of the defendant was, that there was no evidence of any rate having been imposed upon the land in question (which was wild unoccupied land), for the years 1846 to 1850 inclusive, under 59 Geo. 3, ch. 7.

It was also contended by the defendant that certain matters appearing in a book produced by the treasurer of the counties raised a presumption that in the year 1851, all taxes charged for the preceding years were paid, and that no sufficient evidence rebutting that presumption was offered. The effect of this contention, if well founded, would be that the sale in 1856 was illegal, for the reason that no part of the taxes in respect of which the sale took place was due for five years.

The learned counsel for the appellant contended that the judgment in *Cotter* v. *Sutherland*, upon the construction of 59th Geo. III., ch. 7, and the wild land rate thereby authorized, was erroneous, and desired to bring that judgment in review before us in this case; but it is unnecessary to express any opinion upon that point, for the reason that, as was conceded in argument, and as appears by the Statute 59 Geo. III. ch. 8, sec. 3, the road tax therein mentioned was, by the Statute itself, without doubt, rated and charged upon the land, and the question we have to determine is whether or not there was sufficient evidence of that tax, or of any part thereof, remaining unpaid for five years when the sale took place, for the 16 Vict. ch. 182, sec. 55, and subsequent sections, authorized the sale of land for arrears of taxes whenever a portion of the tax upon any land has been due for five years.

Now that the tax imposed by 59 Geo. III. ch. 8, sec. 3, for road tax became and was a statutory charge upon the lot in question for the years from 1846 to 1850, inclusive, I think there can be no doubt; but, in order to understand the point raised by the defendant, viz., that the evidence offered by the plaintiff raised a presumption of payment in 1851 of all previous charges, it is necessary to refer to the 13 & 14 Vict. c. 67, which came into operation upon the 1st of January, 1851.

The 46th section of this Act directed the treasurers of the several counties in Upper Canada, on or before the 1st of January, 1851, to make out and submit to the municipal council of the county a true list of the lands in their counties, respectively, on which any taxes shall then remain unpaid, and the amount of taxes due on each lot or part of lot, both for taxes chargeable under the wild land assessment law and for assessments imposed under by-laws of the municipal councils, and that the said arrears should be certified to the clerk of the proper locality by the county clerk, and should be added to the Assessment Roll for the year 1851, and collected in like manner; and, by the 33rd section, it was enacted that it should be the duty of the clerk making out any collector's roll to forward immediately to the county treasurer a copy of so much of the said roll as should relate to taxes on the lands of non-residents. The same 33rd section enacted that every collector, upon receiving his collection roll, should proceed to collect the taxes therein mentioned, and, for that purpose, should call at least once on the party taxed, or at the place of his usual residence, if within the township, and should demand payment of the taxes charged on the property of such person. Provided always that the taxes upon lands of non-residents in any township might be paid to the county treasurer, who, on being thereunto required, should receive the same and give a receipt therefor, and that such county treasurer should keep an exact account of all sums so received by him, and should pay over the same to the treasurer of the township to which they should respectively belong. Then the 34th section enacted that, in case any party should refuse or neglect to pay the taxes *imposed upon him* for the space of fourteen days after demand, the collector might levy the same by distress and sale of the goods and chattels *of the party who ought to pay the same*. Then the 38th section enacted that the collector should receive the tax on any lot of land separately assessed, or upon any undivided part of any such lot, provided the person paying such tax should furnish in writing a statement of such undivided part, showing who is the owner thereof. Then, by the 42nd section, it was enacted that, if any of the taxes mentioned in the collector's roll should remain unpaid and the collector should not be able to collect the same, he should deliver to the township treasurer and to the county treasurer an account of all the taxes remaining due on the said roll, shewing opposite to each separate assessment the reason why he could not collect the same, by inserting the words "non-resident" or "no property to distrain," as the case might be.

Then the 45th section enacted that the county treasurer should prepare a list of such lands in each township, &c., &c., upon which any taxes should remain due at the time of the collector making his return, distinguishing in separate columns and opposite the respective lots the amounts due for county rates and the amounts due for township rates. The Treasurer of the United Counties was called as a witness upon behalf of the plaintiff, and he testified that taxes at the rate of 1*d.* in the £. for the wild land tax under 59 Geo. III., ch. 7, and ½*d.* per acre under 59 Geo. III., ch. 8, were charged upon the land, and in arrear and unpaid in the years 1846 to 1850 inclusive, and he produced a book which I understand to have been his *non*-resident land roll book, but which did not appear to have the yearly entries made in it in the manner directed by the statute. In this book, opposite to the lot, viz., 15 in 9th concession, in columns headed respectively with years 1846, '47, '48, '49, were blanks instead of the rate for each year. The Treasurer stated that these blanks indicated, as he swore also the fact was, that no taxes were paid to him for those years. In a column headed with the year 1850 were two entries, thus :—

£1 0 3
£1 0 3

40/7

These entries were said to represent the amounts as returned to the municipal council in the schedule furnished by the treasurer, in pursuance of the above quoted directions contained in 13 & 14 Vict. ch. 67, as due upon the N. and S. halves of the lot respectively. In the column under 1851, there was no entry; evidence was given to the effect that in 1851 the whole lot was assessed to one Alex. McDonald, although in 1850 he had been assessed for the N. ½ only. In the years from 1852 to '60, both inclusive, the S. ½ was returned as "non-resident." In the columns headed 1852 and '53 were entered the taxes rated and imposed for those years only. Now upon the evidence it was contended that it must be presumed that, in 1851, all arrears had been collected by the township collector, upon whose roll under 13 & 14 Vict. ch. 67 the arrears had been placed for the purpose of being so collected. The treasurer, as I understand the evidence, had in his office the roll as returned by the collector, which should have shown whether he had or had not been paid those arrears, and he also swore that he had a book in his office in which payment of the arrears, if made in 1851, would appear, which book he had not brought to court with him. The objection, as it appears to me, is not so much one of presumption of payment arising from entries in the book produced as an objection to the sufficiency of the evidence to show that at the time of the sale there remained unpaid an arrear of tax for the period necessary to warrant a sale, in the absence of the collector's roll for the year 1851, and of the book which the treasurer said he had in his office; for if payment was made to the collector in 1851 of the arrears as charged to the year 1850 and entered upon his roll, there were not arrears due for the prescribed period to warrant the sale. It certainly seems to have been great negligence upon the part of the plaintiff and of the treasurer I think also (whose duty it was to produce the best evidence the case admitted of, and which the treasurer swears he had in his office) that such evidence was not produced to establish the fact beyond all doubt. In a case where a plaintiff claims title under a power of sale, such as the power in these cases is, the court should, I think, be very particular in requiring the clearest evidence that the right to exercise the power arose before they adjudge a man to be divested of his estate, unless the law forbids any particular evidence as *prima facie* sufficient in the particular case, and if the case had stopped here I should be decidedly of opinion that the collector's returned roll should have been produced, and that the case should have been adjourned to another day if that was necessary, as was done in *Proudfoot* v. *Austin*, to have enabled the treasurer to produce the rolls; and I gather from Mr. Justice Patterson's judgment that this was his opinion also, for he rests his judgment in favour of the plaintiff, upon the effect of the statute 16 Vict. c. 182, the 51 and 53 sections of which imposed upon the treasurer the duty of keeping a book in which he should enter from the returns made to him by the clerk of the municipality, and from the collectors' rolls returned to him any tax unpaid, and the amounts so due, and he was required, upon the 1st of May in every year, to complete and balance his books by entering against each piece of land, the arrears, if any, due at the last settlement, and the taxes of the preceding year, which might remain unpaid, and to enter thereon the total amount, if any, charged on the land at that date, and to add 10 per cent. thereto each year.

The main object, no doubt, which the Legislature had in view, in requiring the book to be kept by the treasurer, was as well to serve the convenience of the public who had an interest in the matters so required to be entered, as for preserving evidence of the charges against the lands. Such entries so made by a public officer in discharge of a duty imposed upon him by

statute are always received as a *prima facie* evidence of the matters so entered.

The treasurer testified to his having performed the duty thus imposed, and that, in the book which he did produce, he entered under the years 1853 and 1854 as directed, the result, and he moreover pledges his oath to the belief in the correctness of the entries so made; to make which he had necessarily occasion to refer to the rolls in his office, including that of 1851. The entries so made show the amount entered on the collector's roll of that year as still unpaid in 1853 and 1854. This evidence, therefore, unless and until displaced, shows that there remained still as a charge upon the land, so much at least of the amount as consisted of the road tax imposed by 59 Geo. 3, ch. 8, and the accumulations thereon for interest, so that a sale was warranted within the provisions of the statute, as some portion of the tax charged upon the land was due and in arrear for the required period.

No attempt was made to displace this evidence, which no doubt would have been, if it could have been done, for this reason I am of opinion that the judgment of the Court of Appeal should be affirmed and the appeal dismissed with costs.

SOMERVILLE V. LAFLAMME.

(Judgment of TASCHEREAU, J.,* translated by E. D. A.)

The clear and precise statement of all the facts of the case and the contentions of the parties which the Chief Justice of this Court has just made, relieves me altogether from referring to them.

We all agree in saying that, of all the charges made against the respondent on account of his conduct and that of his agents, before and during the election which is in question in this cause, there is but one which can at this moment attract our attention, namely, that pointed out by the Chief Justice; and consequently the question is to ascertain whether the said Placide Robert, the alleged agent of Mr. Laflamme, was in truth such agent or not, and whether he has done an act statutably corrupt by the Elections Act of the Dominion of Canada. What did this man Placide Robert do? This shortly: Wishing to obtain from Mr. Laflamme employment or office for his brother-in-law, Edouard Honoré Ouellette, he asks the defendant, about a year before the election, which is in question in this cause, was in contemplation, to endeavour to procure employment for his brother-in-law, Ouellette, saying to him, that he thought that that would please the family of Pierre Paré, whose son-in-law Ouellette was. Mr. Laflamme said to him that he would think of it and that he would recollect this man, and would try to procure a place for him if a vacancy should occur. Mr. Laflamme repeats that several times, and even up to a period of from two to three weeks before the election. As judges, in the first instance, we find no serious charge to make against the respondent for having used this language—very natural towards one of his constituents, for it is beyond doubt that a representative can and may see to the well-being of the inhabitants of his county in general, and I say that to deny to a representative the patronage of his position, would be an absurdity. Note that the promise is made without condition, without promise of its fulfilment. We are all of opinion then that the respondent has incurred no responsibility in this respect; but later on this gentleman, Placide Robert, acting of his own accord solely, said several times to his brothers-in-law of the Paré family, at the approach of the election, that they had better not vote, and that advantage might be taken of their voting to refuse to procure a place for Ouellette. Here then we have the charge made against Mr. Laflamme on the ground that Placide Robert: 1. had procured some members of his family to abstain from voting or from using their influence in favour of the opposing candidate. 2. That Placide Robert was the agent of Mr. Laflamme and could compromise him.

I am of opinion that Placide Robert did not commit a corrupt act in saying confidentially in his family circle "that it would be better for them not to vote." He was expressing only an idea, an opinion, more or less rational; he was making no threat on Mr. Laflamme's part, he was doing only that which every sensible man would do in the privacy of his family, to the welfare of which he might wish to contribute as a good-natured son and brother.

I consider that to preserve the purity of elections, we need not penetrate into the bosom of families and strive to find a crime in the very natural expression in a man's home of the desire to see his brother receive a trifling employment. If we were to construe such observations, such counsels as equivalent to corruption, I will ask how many of our elections would be sheltered from such charges?

In my opinion, there are wanting in these counsels of Placide Robert, to constitute them a corrupt practice, several elements, namely, threats, rude upbraidings, exaggerated expression of the consequences of the conduct of his family, and above all, the information given to this family that Mr. Laflamme had made the promise only on the condition that they should abstain from voting. I see nothing of the kind in the evidence. I see there but the delibera-

tions between relatives desirous of protecting themselves. I remark on the brief, the proof that this M. Edouard Honoré Ouellette never received office. Consequently I am of opinion that Placide Robert has not committed an act of corruption in his conversations above related, and that he has not caused the defendant to incur any legal responsibility, even supposing that he could be considered as his agent.

Being of opinion that Placide Robert did not commit acts reprehensible in a legal point of view, it is useless for me to discuss the question of agency, and in consequence I am of opinion that the appeal should be dismissed with costs against the appellants.

* [We have inserted the above translation of one of the judgments in a well-known election case, thinking that it will not be without interest to those among our subscribers who may be unacquainted with the language of the original, which will be found at p. 291, 2 Sup. Ct. Rep.]

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR AUGUST, SEPTEMBER, AND OCTOBER, 1878.

(*Concluded.*)

Nuisance.—See Negligence.

Nullity.—See Husband and Wife, 2.

Parties.—See Trust, 3.

Partition.

The Partition Act (31 & 32 Vict. c. 40) provides that, at the request of one part owner for partition, there shall be a public sale, unless the other part owner can show good cause why some other course should be taken. Plaintiffs owned three-sixteenths of property in a town where improvements were going on, and applied for a public sale. Defendant, who owned the remaining thirteen-sixteenths, opposed it, and offered to buy the portion of plaintiff's at a valuation. *Held*, that there should be a valuation in chambers of the three-sixteenths, instead of a public auction of the whole. *Drinkwater* v. *Radcliffe* (L. R. 20 Eq. 528) considered.—*Gilbert* v. *Smith*, 8 Ch. D. 548.

Pleading and Practice.—See Libel, 3; Trust, 3.

Policy.—See Insurance, 1.

Precatory Trust.—See Will, 2.

Principal and Agent.—See Contract, 1, 2.

Principal and Surety.—See Surety.

Privileged Communications.—See Libel, 1.

Promise.—See Limitations, Statute of, 2.

Proximate Cause.—See Bills and Notes, 1 Negligence.

Quarry.—See Waste.

Realty and Personalty.—See Will, 1.

Residue.—See Will, 3, 6.

Sale.

A contract of sale provided, that if the purchaser should make any objection or requisition in respect of the title, or of any other matter which the vendors should be unwilling, by reason of expense or otherwise, to comply with, they should be at liberty to annul the sale, and the purchaser should receive back his deposit. The vendors failed to show any title whatever, and claimed to annul the contract and to return the deposit. *Held*, not competent, and that the purchaser could have the deposit, and an inquiry for damages. —*Bowman* v. *Hyland*, 8 Ch. D. 588.

Statute.

Where persons played a game called Puff and Dart, which consisted in blowing a small dart through a tube at a target, and the players each put in 2d. entrance money, and the money was used to buy a dead rabbit, which was the prize of the game, *held*, (Cockburn, C. J., in doubt), that the players were guilty of "gaming," within the Licensing Act, 1872, 35 & 36 Vict. c. 94).—*Bew* v. *Harston*, 3 Q., B. D. 454.

Surety.

The plaintiff leased to B. a farm of 234 acres, and pasturage for 700 sheep, which went with the farm, from year to year, from April 10, 1873, rent payable half-yearly. B. gave a bond, with the defendant and others as sureties, that he would re-deliver the sheep in as good order and number as when he took them, and, if there was any deterioration, damages should be assessed. November 9, 1875 plaintiff gave B. notice to quit on April 10, 1876, or at such time as the notice should be a good notice for. It was admitted that the notice was insufficient to end the lease on April 10, 1876. April 8, 1876, B. refused to obey the notice to quit, and it was withdrawn, and an agreement was made between him and the plaintiff that B. should surrender a certain field, and the rent should be reduced £10 yearly. Under this modification, B. continued tenant until October 5, 1876. Plaintiff gave

him due notice to quit April 10, 1877. Before then B. went into bankruptcy, and his trustee took possession, and surrendered it to plaintiff March 29, 1877. It turned out that the flock had deteriorated, and that the field surrendered would have supported a certain number of sheep. The judge left it to the jury to say whether the new arrangement between B. and the plaintiff made any material change in the capacity of B. to keep the sheep in good order, and to return them without deterioration; and also the jury found that it did not. *Held*, that the negotiations between B. and plaintiff had not created a new tenancy, but (Brett, L. J., diss.) that the modification in the terms of the lease, by the surrender of the farm and the reduction of the rent, ought to have been made known to the sureties; and that it was for them, and not for a jury to say whether that modification had materially affected their liability, by lessening the ability of B. to keep the flock intact, and that they were discharged from liability.—*Home* v. *Brunskill*, 3 Q. B. D. 495.

Trade-mark.

The plaintiff, M., published a work entitled "Hemy's Royal Modern Tutor for the Pianoforte," not copyrighted. It had a great circulation. The defendant, W., employed Hemy to prepare an edition of an old work, formerly in repute, called "Jousse's Royal Standard Piano-forte Tutor," and it was issued under the title, "Hemy's New and Revised Edition of Jousse's Royal Standard Piano-forte Tutor." The word "Hemy's" was in much larger type, and more conspicuous on the cover and title-page than any of the other words. *Held*, that an injunction should be granted to restrain the use of the title-page and cover, and of any title-page and cover calculated to lead the public to believe they were purchasing plaintiff's publication.—*Metzler* v. *Wood*, 8 Ch. D. 606.

Trust.

1. A testator gave his residue to trustees to sell out and invest in parliamentary funds and real securities. It was, however, provided that the trustees for the time being might "sell out, transfer, or otherwise vary or alter, all or any of the said trust moneys, funds and securities, and invest the same" in any other funds or securities whatever. The trustees put the property into £3 per cent. annuities; but their successors afterwards sold these out, and invested in Egyptian bonds and Russian railway bonds, transferable by delivery; and each trustee took one-half of them to keep. One of them absconded with the portion in his hands, and the bonds greatly sunk in value. *Held*, that the trustees were authorized by the will to change the investment as they did; but that the remaining one was responsible for the portion of the property made off with by the other.—*Lewis* v. *Nobbs*, 8 Ch. D. 591.

2. A testator left his residue in trust for J. and others, his children, the provisions to vest in them at his death, and be paid six months thereafter. Notwithstanding this period for payment, "I provide and declare that it shall be lawful to, and in the power and option of, my trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so the payment . . . as aforesaid in the case of all or any of my children, . . . and to apply the interest or annual produce of the same during the . . . postponement to or for behoof of such children . . . or by deed under their hands to retain said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorized to appoint, with all . . . the powers . . . belonging to themselves, . . . so that my children, . . . or any of them . . . may draw . . . only the . . . annual proceeds of their respective provision during their lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children and their issue, on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges.' J. received the annual income on his share from the trustees from 1871 to 1876, and also a part of his capital. The respondents then got judgment against J., and proposed to arrest the balance of J.'s capital in the trustees' hands, and apply it in payment of their debt. After the action was brought, but before the judgment, the trustees executed a deed to themselves, to pay the interest to J. for life and the fee to his children, and resolving to hold the balance as an alimentary fund for J. and his family. *Held*, reversing the opinion of the Scotch court, that the trustees' discretion was complete) both as to principal and income, and the creditors had no claim on

either. Effect of testing clause considered extrajudicially.—*Chambers* v. *Smith*, 3 App. Cas. 796.

3. L. bequeathed the residue to R, J., and I., trustees, to pay the income to his wife for life, and then to invest £850, and to pay the income of £500 thereof to his daughter, M., for life, and at her death for her children; and to pay the income of the other £350 to his daughter, B., for life, and at her death to stand possessed of the amount for her children. If M. died without issue, her share should go and be divided among L.'s other children, in like manner as their original shares were given them. Testator died in 1854, his wife in 1856, and M. in 1859, without issue. Thereupon B. became entitled to the income of one-third of M.'s £500, or £166 13*s.* 4*d.* in addition to her own, *i.e.*, to the income of £516 13*s.* 4*d.* R. advanced B. £50, and paid her interest upon £350 from the death of the wife, and on £466 13*s.* 4*d.* from the death of M. He died in 1863, and his executors continued the payment until 1874, with the knowledge of those interested in R.'s estate. There was among L.'s property a mortgage for £1,200. Between his death and the death of R., £700 of this was paid off in instalments. After the death of R., one of his executors received the other £500 in instalments. The receipts for the £700 were sometimes signed by R. alone, sometimes by R. and the other executors. For the £500, the receipts were signed by one of R.'s executors, "for the executors of L." R.'s executor paid J. one-third of the £500, I. one-third, and kept one-third himself. In 1877, B. began an action against the executors of R. to have the £516 13*s.* 4*d.* and the back interest restored out of R.'s estate. It was objected that L.'s other trustees should be joined. I. was in New Zealand, and J. had died. *Held*, by Fry, J., that the other executors were not necessary parties, and that B. could recover. On appeal, the point as to the parties was waived. *Held*, that B. could recover.—*Wilson* v. *Rhodes*, 8 Ch. D. 777.

Will.

1. J., by his last will, said: "I give and bequeath unto my wife . . . all my household goods and furniture and implements of household, farming-stock, cattle, growing crops, and other my effects in and about the house and upon the farm and lands in my occupation; . . . and also all my ready money and money out at interest, and . . . mortgages, bonds, bills, book debts, &c., and all other my personal estate, property, chattels, and effects whatsoever and wheresoever, to which I am now seized, possessed, or entitled to, or may hereafter acquire and can hereby dispose of, to hold the same unto my said wife, . . . her executors, administrators and assigns, . . . absolutely, and I do hereby devise all real estate" . . . held on mortgage to her; . . . "but the money secured on such mortgages shall be considered as" personal estate. "I also devise" to her "all . . . estates . . . vested upon me in any trust." The testator left estates in fee. *Held*, that these did not pass by the will.—*Jones* v. *Robinson*, 3 C. P. D. 344.

2. A gift of all a testator's property to his wife, "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," *held*, to be an absolute gift to the wife, free from any trust.—*Lambe* v. *Eames* (L. R. 6 Ch. 597) followed; *Cormick* v. *Tucker* (L. R. 17 Eq. 320) and *Le Marchant* v. *LeMarchant* (L. R. 17 Eq. 414) impugned.—*In re Hutchinson*, 8 Ch. D. 540.

3. S. made a legacy to A. and one to B., and then said: "Lastly, I give my sheep, and all the rest, residue, money, chattels, and all other my effects, to be equally divided among my brothers," naming them. He appointed his brothers executors. He left real estate. *Held*, that it passed to his brothers under this clause.—*Smyth* v. *Smyth*, 8 Ch. D. 561.

4. A testator gave several charitable legacies, including one of £1,000 to a hospital in N., and then said: "I direct that my executors shall apply to any charitable . . . purposes they may agree upon, and at any time, the residue of the personal property, which by law may be applied to charitable purposes, remaining after the payment of the legacies." By a codicil, he gave another £1,000 to the hospital at N. The executors voted to give the residue under the above clause to that hospital. *Held*, that the directions to the executors in the gift were so vague as to render it invalid, and the residue went to the next of kin.—*In re Jarman's Estate. Leavers* v. *Clayton*, 8 Ch. D. 584.

5. H., by his will, devised, *inter alia*, his manor-house of D., and all his "messuages, tenements, lands, and hereditaments situate at or within D., and then in the occupation of

J.," and all his lands situated at S. G., then or late in the occupation of S. He had three farms situated wholly or partly in the parish of D., two of them in the occupation of J. Of the first, the farm-house and eight closes were in D.; the remaining close was in I., separated by a hedge. Of the second, the farm-house and eight closes were in D.; the remaining three closes were in K., separated from D. by a road. The third was entirely in D. and in the occupation of G. He had two farms at S. G., one in the occupation of S., and the other in the occupation of J. The parish church of D. was within a few feet of the line between D. and K. There was evidence that the farms would be much injured by dividing them on the parish lines. *Held*, that the devise of lands situate at or within D., and in the occupation of J., included the entire farms so occupied, though partly in other parishes, and that the devise of "all" the lands in S. G. in the occupation of S. did not include a farm there in the occupation of J.—*Homer* v. *Homer*, 8 Ch. D. 758.

6. W. directed his debts to be paid out of his personal estate, and, if that proved insufficient, the real was to be sold. All the rest and residue of his personal estate he bequeathed to his daughters. By a codicil he made some alteration in the disposition of his real estate, and then said: "As to all moneys that may be left after my decease, I give and bequeath the same unto my children, W. J., and M.," to be invested in a mortgage, the income to be paid them for life, and, "after their decease," to testator's grandchildren. *Held*, that this clause in the codicil applied only to cash actually in hand at the testator's death, and, subject to that, the residuary clause in the will proper conveyed the residue.—*Williams* v. *Williams*, 8 Ch. D. 789.

7. A testator devised to trustees three freehold houses in trust for his two daughters, either to live in or to let for their joint benefit; and, should either of them die without issue, one of the houses should be sold, and the proceeds divided equally between the other and testator's surviving sons. But, in case either daughter should have a child, then such child should have its mother's share of the rents and profits of the three houses after its mother's decease. One daughter died without issue, and one house was sold, and the proceeds divided as directed in the will. Finally the other daughter died, also without issue. *Held*, that the daughters were joint tenants in fee, subject to executory gifts over in the event of issue. The event having never happened, the survivor was entitled to the whole in fee from the death of her sister.—*Yarrow* v. *Knightly*, 8 Ch. D. 736.

See Devise; Trust, 1, 2, 3.

Words.

"*At or within.*"—See Will, 5.

"*Gaming.*"—See Statute.

"*Moneys that may be left after my Decease.*"—See Will, 6.

"*Person.*"—See Corporation.

REVIEWS.

The Principles of Equity, intended for the use of Students and the Profession. By Edmund H. T. Snell, of the Middle Temple, Barrister-at-Law. Fourth Edition. To which is added an Epitome of the Equity Practice. By Archibald Brown, M.A. Edin. and Oxon., and B. C. L. Oxon., of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1878.

No words of ours are needed to commend a new edition of "Snell's Equity" to the profession. The fact that it has passed through four editions within a decade is a sufficient mark of the esteem in which this standard work is held. We believe, too, that we echo the sentiments of every "student," in the more technical and restricted sense of that term, when we say that no book in the curriculum prescribed by the Law Society has afforded him more pleasant and profitable reading than the work in question. The lamented author seemed throughout to have kept steadily in view the requirements of his former comrades, and thus while the work is undoubtedly of great value to the young practitioner, its lucid arrangement and perspicuous style have given it a character and excellence peculiarly its own in the eyes of those who have not yet been privileged to pass beyond the outer circle of the Temple of Justice.

The changes in equity practice in England introduced by the Judicature Acts

have rendered a new edition of this work necessary, and made the office of the editor by no means a sinecure. He seems to have done his work carefully and well, and to have justified the statement which he makes in his preface that he has "generally worked up the language and the contents of the book to the level of the new procedure . . . . and to the present state of the law." At the same time we are glad to observe that he has altered little or nothing in the general character impressed on the work by the original author.

The special feature of the present edition is an epitome of the equity practice under the Judicature Acts, which the editor has added as a second book to the "Principles of Equity" which formed the sole subject of the preceding editions. This epitome takes up about 130 pages, and is separately indexed. It appears to be a carefully compiled digest of the new practice, and will, no doubt, be found useful by students and practitioners in the mother country. It is, however, of little or no value in this province, at present, and our readers will probably agree with us in thinking the increased size of the volume a somewhat dubious benefit. The "Practice," however has been kept entirely distinct from the "Principles of Equity," in this edition, and will, therefore, in no way interfere with the separate study of the latter. On the whole we may repeat with emphasis the words used by us in reviewing a former edition of this work—"we know of no better introduction to the 'Principles of Equity.'"

The Consolidated Railway Act, 1879 (42 Vict., cap. 9): With an Index and Synopsis of its Provisions. By R. J. Wicksteed, of the Law and Translation Department, House of Commons. Ottawa: Brown Chamberlin, Law Printer to the Queen.

This publication is in the form of a neat pamphlet, and, as might be expected from its title and the name of its author, will be found exceedingly useful; and, indeed, indispensable to those who are called on in any way to deal with the Law of Railways in the Dominion. Members of the legal profession, at all events, scarcely require the authority of a Carlyle to convince them of the value of a good Index, and we are sure that the one furnished in this publication by Mr. Wicksteed will meet with their approbation, and save the expenditure of no little time and trouble on their part. We may add that the Queen's Printer at Ottawa has charge of the sale and distribution of the edition.

FLOTSAM AND JETSAM.

Copyright in Canada.—In Montreal, on June 16, a seizure of copies of the ninth volume of the new edition of the "Encyclopædia Britannica" was made, at the instance of Messrs. A. & C. Black, of Edinburgh, in the following circumstances:—Messrs. Black had entered into an arrangement with Messrs. Scribner and Sons, of New York, whereby the latter were to reprint the work in question for the supply of the United States and Canada. As the law of neither of these countries recognises such an arrangement, a Philadelphia firm also reprinted the work and disposed of it over the whole North American continent. On discovering this, the Edinburgh publishers caused copyright to be obtained in Canada under the Act 38 Vict. c. 88 of the Dominion, for several important articles contained in the ninth volume of the "Encyclopædia," and it is on the strength of these articles being found in the volume issued by the Philadelphia firm that the seizure has been made.—The Law Journal, August 2, ult.

Let us try to arrive next at an idea of the size of this territory, which but nine years since was the property of "the Company of Adventurers of England trading into the Hudson's Bay," and whose charter, granted in 1669 to Prince Rupert and nineteen other gentlemen, made them despotic rulers over half a continent on the easy terms that two elks and two black beavers should be paid to the Sovereign whenever he should come into the district. This enormous territory thus easily disposed of, and the value of which for agricultural and mining purposes is unsurpassed, the last and best acquisition of the Dominion of Canada, comprises, as near as can be calculated, 2,984,000 square miles, whilst the whole of the United States south of the international boundary contains 2,933,600 square miles. Including the older portions of Quebec, Ontario, and the Maritime Provinces, Canada measures 3,346,681 square miles, whilst all Europe contains 3,900,000.—*Nineteenth Century*, July, 1879.

Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 42nd VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

Thomas Stinson Jarvis.
Thomas Taylor Rolph.
Louis Adolphe Olivier.
Malcolm Græme Cameron.
George Edgar Millar.
Nicholas Dubois Beck.
Walter J. Breakenridge Read.
Emerson Coatsworth, Jr.
John Morrow.
James Carman Ross.
Alphonse Basil Klein.
Edward George Ponton.

The names are given in the order in which they appear on the Roll, and not in the order of merit.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

John Dickinson, B.A.
John McLaurin, B.A.
Antoine P. E. Panet, B.L.

Matriculants.

Charles Reginald Atkinson.
John McCullough.
George William Ross.

Articled Clerks as of Hilary Term.

William Barr.
Edward Utton Sayers.
John Angus McDougal.
James A. Scott.
William Grayson.
John Lawson.
Francis Henry Butler.

Articled Clerk as of Easter Term.

Andrew Joseph Clark.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography – North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

Mathematics.

Arithmetic: Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical analysis of a selected poem :—
1879.—Paradise Lost, Bb. I. and II.
1880.—Elegy in a Country Churchyard and The Traveller.
1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.
Translation from English into French Prose—
1878 and 1880 } Souvestre, Un philosophe sous les toits.
1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.
Museeus, Stumme Liebe.
1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.
1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR OCTOBER.

2. Thur..Prince Arthur visited Toronto.
5. Sun. ..17th Sunday after Trinity.
6. Mon....County Court Terms and sittings (exclusive of York) begin. Lord Chelmsford died, 1878.
8. Wed...R. A. Harrison sworn in as C. J. of Queen's Bench, 1875.
9. Thur..T. Moss sworn in as Judge of Court of Appeal, 1875.
11. Sat. ..County Court Term (exclusive of York) ends. Guy Carleton, Governor of Canada, 1774.
12. Sun. ..18th Sunday after Trinity.
13. Mon. ..County Court Term for York begins. Battle of Queenston, 1812.
18. Sat. ..County Court Term for York ends.
19. Sun. ..19th Sunday after Trinity.
21. Tues...Battle of Trafalgar, 1805.
23. Thur..Lord Monck, Gov.-Gen., 1861.
24. Frid...Sir J. H. Craig, Gov.-Gen., 1807.
25. Sat. ..Battle of Balaclava, 1854.
26. Sun. ..20th Sunday after Trinity.
31. Frid....All Hallow Eve.

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Canada Law Journal.

Toronto, October, 1879.

We may hope that a hearty welcome and a fair amount of "Queen's Weather" will have caused the Governor-General and Princess to carry away with them pleasant recollections of their first visit to Toronto. It was fitting that they should nowhere meet with a warmer reception than in the principal city of this loyal Province; a reception which assuredly indicated not only the attachment of a free people to the Crown and institutions under which they live, but also their recognition of the personal qualities of His Excellency and Her Royal Highness.

We have received with great regret the announcement of the sudden death of Mr. Isaac Grant Thompson, the founder and conductor of one of our most valued exchanges, the *Albany Law Journal*. His short life of thirty-nine years was one of unremitting labour in different departments of legal literature. He was the author of treatises on the "Law of Highways," "Provisional Remedies," &c., and the editor of the series of "The American Reports," commenced in 1871 It will, however, be in connection with the *Albany Law Journal* that Mr. Thompson will be best remembered by the profession, and we can easily believe the statement of his *collaborateur*, that in editing its pages he found his favourite and most appropriate work.

Our readers will certainly not have forgotten the excellent and entertaining work on "The Wrongs and Rights of a Traveller," by Mr. R. V. Rogers, Jr., of Kingston, a review of which appeared in our columns some years ago. We have

received a second series of "Legal Recreations," in the shape of a volume by the same author, on "The Law of Hotel Life; or, the Wrongs and Rights of Host and Guest." We have perused "Hotel Life" with great pleasure, and had intended to give a somewhat extended review of it in our present issue, but have been compelled to hold our notice over till next month. In the meantime we can cordially recommend Mr. Rogers' book to all who recognize the advantage (and who does not) of a skilful blending of the *utile cum dulci*.

We notice in the last batch of English Statutes, the new Bankers' Book Evidence Act, 42-43 Vict. c. 11. By this Act (s. 1), a copy of any entry in a banker's book shall, in all legal proceedings, be received as *primâ facie* evidence of such entry, and of the matters, transactions and accounts therein recorded; but (sec. 2) it must be first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. By sec. 6, a banker, or officer of a bank shall not, in any legal proceeding, to which the bank is not a party, be compellable to produce any bankers' book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions or accounts therein recorded, unless by order of a Judge made for special cause. By sec. 7, a Court or Judge may order that any party to a legal proceeding be at liberty to inspect or take copies of any entries in a bankers' book, for any of the purposes of such proceeding; which order may be made without summoning the bank or any other party.

Of the others, the Habitual Drunkards' Act, 1879, aims at establishing a number of licensed retreats, to which habitual drunkards may, on their own application, be admitted, and in which they will, when once admitted, be liable to be detained to the end of the term, which was originally proposed as the limit of their restraint. The inmates of these retreats, moreover, under this Act, will subject themselves to criminal punishment for wilfully neglecting or refusing to conform to the rules of the retreat. "Those dreadful fellows, the critics," appear by no means to approve of this statute. The *Law Times* observes, "although we fully expect that it will prove a complete failure, we cannot but regret that so ill-framed a legislative measure should find its way into the statute-book."

At one of the public debates of the Legal and Literary Society not long ago, the distinguished Judge, who presided on the occasion, expressed very decided disapprobation of the present action for breach of promise of marriage. It is interesting to note, in connection with this, that, during the last Session of the British House of Commons, Mr. Herschell proposed, and succeeded in carrying, by a very fair majority, the following motion:—that "the action for breach of promise of marriage ought to be abolished, except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss." The *Scottish Law Magazine* remarks, that the House of Commons is as yet composed only of representatives of men, and hints that Mr. Herschell could scarcely have been so bold if he had an enraged female constituency to face. It objects that this resolution attempts to regulate, by Act of Parliament, what has always been considered a jury question, depending on the special circumstances of each case—and points out that the proposed alteration in the

law would, in so far as Scotland is concerned, be in a retrograde direction. It appears that formerly, in Scotland, the rule *matrimonia debent esse libera* was closely adhered to, and that no action for damages was allowed, based upon the mere fact that a promise to marry had been broken (Erskine I. vi. 3). But gradually the law became more and more liberal towards the unfortunate "pursuers" of such actions, and even before the Jury Court became a Scottish institution, the hearts of their stern "Lords" had been touched, and in determining the actual loss they gave something over and above, by way of consoling wounded feelings, and at last wounded feelings alone were held sufficient to warrant a decree for even substantial damage. In *Hogg* v. *Gow* (1812, F.C.) the matter was fully argued. A strong attempt was made to have the old law of Scotland recognised, and to show therefrom that no damages could be awarded against the defender for refusing to "implement his promise of marriage." The matter was carried to appeal, and the majority of judges agreed in awarding heavy damages. Lord Meadowbank asked if it was no wrong to inflict perhaps the severest distress the human mind can suffer. Referring to the expression in the old case of *Grahame* v. *Burn*, (1685, M. 8472), "loss of the market," he thus explains it. "How does she lose market? Why she loses it because she is not disposed herself to fall soon in love again. Her heart is used; it is worn; she is less attractive to others. A person of any kind of worth of character that has sufferred the calamity of being tricked by a male jilt, is very little disposed for some time to listen to courtship; she is rendered incapable of it." Waxing eloquent, he goes on to say: "Are we at this time of day, in the commencement of this century, to find that we are still in the midst of barbarism; that we are still so blind to the worst of injuries, to the greatest of wrongs, that we are not to give redress." The writer in the *Law Magazine* forcibly remarks, "had his lordship been able to look forward to the old age of this century, he would have found a large majority of the House of Commons returning to what was, in his opinion, "the midst of barbarism."

VICE-ROYALTY AT OSGOODE HALL.

It would not be fitting that so auspicious an occasion as the recent visit of the Governor-General and of Her Royal Highness the Princess Louise to Osgoode Hall should pass without record in these pages. At the same time no lengthy account of an event, so fresh in the memory of all, is needed, nor would our space permit of it.

Shortly after four o'clock His Excellency and the Princess arrived at the Hall, accompanied by the Lieutenant-Governor and Miss Macdonald, the Hon. Mr. Evarts, Secretary of State of the United States, and Colonel Gzowski, A.D.C. The Viceregal party were received at the entrance by Hon. Edward Blake and a reception committee of the Law Society, and conducted to the library, where a full representation of the Bench and Bar and a brilliant gathering of ladies had assembled. Among those present were Mr. Justice Gwynne, of the Supreme Court, Chief Justice Moss, Chief Justice Hagarty, Chief Justice Wilson, Chancellor Spragge, Mr. Justice Burton, Vice-Chancellor Blake, Mr. Justice Cameron, Mr. Justice Osler, Hon. Mr. Mowat, Judge Mackenzie, the Mayor of Toronto (Jas. Beatty, Q.C.), and others.

His Excellency and the Princess having been conducted to a dais Hon. Ed-

ward Blake came forward and read the following—

ADDRESS TO HIS EXCELLENCY.

To His Excellency the Right Honourable Sir John Douglas Sutherland Campbell, K.T., G.C.M.G., Marquis of Lorne, Governor-General of Canada, etc.

May it please your Excellency,—The Law Society of Upper Canada, on behalf of the Bar of Ontario, heartily welcomes your Excellency and H. R. H. the Princess Louise to Osgoode Hall, the seat of the profession and of the Provincial Courts.

The Bar, concerned, as it is, in the exposition and enforcement of the laws, has ever taken an active interest in political institutions framed upon the British system, which has been well said to embody the rule of law.

Among the numerous distinctions of your Lordship's House it is recorded that the first strong declaration of the fundamental principle that some one must be responsible for every act of the Crown was made a hundred and forty years ago by the Duke of Argyll of that day. A century later our people were agitated by the claim of her Majesty's subjects in North America to the practical application of that principle to their local government. And now after a long experience has proved the wisdom of its concession, we hail your Excellency's arrival among us in the confident belief that you will approve yourself an eminently constitutional Governor, and we beg to assure your Excellency of our sincere attachment to the Queen, under whose benign sway her people in this province have so greatly prospered.

We receive with the utmost pleasure Her Royal Highness the Princess Louise, who is dear to us not only as the daughter of our Queen, but also by reason of her ample recognition and conscientious discharge of the responsibilities of her exalted station, and we earnestly wish for your Excellency and her Royal Highness a long career of prosperity and happiness.

Edward Blake,
Treasurer.

Osgoode Hall,
Toronto, 10th Sept., 1879.

The Governor-General then read the following reply :—

Gentlemen,—I return to you my heartfelt thanks for the eloquent expression of your loyalty to the Queen, the head of that free Empire whose just and equal laws it is your duty to illustrate and your privilege to enforce.

I do not know that any better instance of the importance of the Canadian Bar, and of the great position occupied by the body I have now the honour to address in the capital of Ontario, can be adduced than by these facts:—The Queen's Representative has, at the present moment, as chief adviser, a gentleman drawn from your ranks; and in the Chancellor of the University and your present spokesman we are welcomed by one who, while he fills the Chancellor's chair with such distinction, has also held office in a Dominion Government.

In the presence among the statesmen of the country of so many who owe their rise to ability displayed at the Bar, we see another resemblance in the young land to that old country from whom it is your boast to have derived your descent, and whose practice and custom in all affairs of government are here receiving a fresh and striking confirmation of the wisdom of that patience which has allowed our law to broaden, like our freedom, from precedent to precedent.

It is alone to your profession that your fellow-citizens have recourse for advice in affairs that touch both private and public life; and how widely spread are the individual interests placed in your hands in the single Province of Ontario alone. Your jurisdiction extends over territory greater than many of the ancient kingdoms of the Old World, and this is considering one Province only. In cases where life may be forfeit to the law, evidence coming from countries widely separate as are Nova Scotia and British Columbia, has to be weighed and sifted by the responsible Minister of Justice in the Dominion Government, while the highest placed among you, namely, they who occupy a seat on the Bench of the Supreme Court, have to consider questions perhaps as complicated and involving consequences of as great importance as are settled by the chiefs of any Bar. Questions of constitutional law, affecting materially relations of the State, are submitted to the opinions of Judges whose ability and independence would be an honour to the oldest State in Europe.

The Princess thanks you for the welcome given to her by the members of the Law Society, and I hope that you will be disposed to accord to me when my term of office is finished the credit of a desire to develop to the full in Canada those constitutional principles to which you have made allusion, and which have been so happily recognized during the long reign of our Sovereign the Queen.

Lorne.

Mr. Blake, then, by permission of his Excellency, alluded to the presence of Mr. Secretary Evarts. He referred to the impeachment of the President of he United States and to the Geneva

arbitration as being two of the greatest cases in which Mr. Evart had been concerned. He continued as follows :—

As a statesman he is as distinguished as he is as a jurist. The address to which your Excellency has so graciously responded refers to the fact that the members of the Bar have always taken a deep interest in the political history of the country. To this rule, Mr. Evarts has been no exception. He now holds the chief office in the department of State, a post made illustrious by such occupants as Jefferson, Marshall, Adams and Livingstone. From the ranks of the two great departments to which I have referred have commonly been recruited the chief justices of the United States Supreme Court, the most important judicial position to be found among civilized nations. This Province is necessarily deeply interested in the life that passes along the other side of the border. For many hundreds of miles our land is conterminous with that of the United States. It is an invisible and impalpable line, and serves rather as a means of communication than as a line of demarcation. Although all the powers of the greatest empires could put no obstacle to the passage of that line, yet a little printer's ink and some paper had been able to place serious impements in the way of trade. I hope that this will not be for long, and that from neither side will tariff wars be kept up. Our guest must have inferred from the references in the address to your Excellency that the sacred fire of freedom burns as purely and is attended by as fervent a warmth under a monarchical form of government as under the Government from which he comes. I would ask him to reflect upon the points in regard to which all English-speaking people are alike, rather than on the points on which they differ. While in our country the form of Government is monarchical, and in the United States republican, yet there appears that marked resemblance that both countries may emphatically be called commonwealths, inasmuch as the rights of the people, to have a voice in the making of the laws by which they are governed, is recognized by the constitution. These are the points of resemblance which surely outweigh the points of dissimilarity. I hope that the great mass of the English-speaking races in this continent may work together in harmony by virtue of the common bond of brotherhood, rather than by one of parchment paper. I congratulate the members of the Bar upon the opportunity they have of becoming acquainted with so distinguished a gentleman as Mr. Evarts.

Mr. Evarts, in reply, remarked that he could see no difference between the people on this side of the line and those on the other. It would be quite obvious to all here that lawyers were kind to each other. Not until he had heard the sound of the eloquent speech of the head of the legal profession here had he heard of anything to be said, and he had neither expected a speech to be made nor that he would be called upon to reply to so many compliments. Mr. Blake had very kindly referred to some of the celebrated cases in which he had been engaged, some of which had determined issues such as heretofore had been referred to the arbitrament of the sword. He had been very fortunate that, in the great cases to which reference had been made, he had always been on the winning side ; and some of them were great examples of the power of law in our generation as compared with war. The settlement of the differences between Great Britain and the United States—which in early times would have been submitted to the arbitrament of arms—by the generosity of the British nation and the prudence of the American nation had been submitted to a civil tribunal, which had been left to determine between the two most powerful nations of the world—a very great triumph, indeed, for law. He thanked them for the kind wishes expressed towards himself.

The Vice-Regal party then, after seeing some of the courts, took their departure, leaving, as usual, a very pleasant impression in the minds of those whom they had honoured by their visit.

TRIAL BY JURY.

Cl. of Ar. Gentlemen, are you agreed.
Omnes. Yes, my lord, we are all agreed now.

Trial by Jury has recently been the subject of much lively criticism, owing to the revelations regarding the verdict in the Mainwaring murder case in England. Mr. Cross, the Home Secretary, produced before the House of Commons a letter from the foreman of the jury, in which the writer stated that, after the jury had retired, it was ascertained that they were equally divided as to the verdict. Six were for manslaughter, and six for wilful murder, with a strong recommendation to mercy. They, therefore, ballotted for a chairman, and agreed that the vote of the majority should carry the verdict, and that, if they were equally

divided, the chairman should have a casting vote. The foreman innocently requested that the greatest publicity might be given to the letter, in order to contradict the many false reports that had been in circulation; and was, probably, much astonished at the obtuseness of Mr. Cross, who regarded their course of action as very like casting lots for the verdict. The *Times* hints that such delinquency on the part of jurymen is by no means unparalleled; while a writer in the *Albany Law Journal* makes a strong attack on the whole system of trial by jury. He regards it as a relic of the past, which, like slavery, once served a useful purpose, but should now be abolished. Certainly the reasons for the continuance of an institution are not always the same as the reasons to which it owed its origin, and the writer in the *Albany Law Journal* maintains there is no reason for the continuance of trial by jury at all. In the days of inequality it was a defence of the weak against the strong, and so promoted justice. Where equality prevails it promotes injustice. As it now exists it is beneficial to only two classes—professional jurors and jury lawyers. In places he becomes more abusive than argumentative. Thus for example he says:—

"The Jury is the clown of the law. It is constantly inventing new and ingenious tricks for the evasion of duty. It is the patron of the joke called 'temporary insanity,' and the author of numberless other jests of a like character. It is a never-failing source of amusement to all except its victims. There is nothing certain about it but its uncertainty. It has been sneered at and satirised and lampooned and caricatured. Judges have snubbed it, and legal wits, like Curran, have riddled it with sarcasm in open Court. Yet a mistaken conservatism suffers it to continue its blundering way, unchallenged."

He asks what greater virtue lies in twelve than in three, six, or nine—what reason there is for requiring absolute unanimity in the decision—why the majority should not control in law as in politics, in juries as in appellate courts—and sundry other unpleasant questions calculated to make the Palladium of our liberties shake upon its pedestal. And there is no doubt that—especially as regards the requirement of unanimity—he is not without supporters. This, as Mr. Forsyth points out in his "History of Trial by Jury," (ch. xi), has been attacked by such men as Bentham, Professor Christian, and Mr. Hallam, who (Supp. Notes, Midd. Ages, p. 262) speaking of "the grand principle of the Saxon polity, the trial of facts by the country," says:—"From this principle (*except as to that preposterous relic of barbarism the requirement of unanimity*) may we never swerve—may we never be compelled, in wish to swerve—by a contempt of their oaths in jurors, and a disregard of the just limits of their trust."

But "vixere fortes ante Agamemnona," and years before any of these gentlemen, our fellow-countrymen in Lower Canada, assailed this feature of jury trial. Mr. Baron Maseres, who was Attorney-General of Canada up to 1773, in his Account of the Sentiments of the Canadians concerning the Introduction of English Laws and Trial by Jury into the Province, cited in 14 How. St. T. 618, says, (p. 324):—

"Some of the Canadians observed that it was a strange thing, and a hard one, to force twelve persons, who really think differently upon a doubtful matter that is referred to their determination, to say, upon their oaths, that they are all of the same opinion, and to continue to be shut up together without food or light, till they do so. This, they said, was putting the decision of causes into the power of those jurymen who had the strongest constitution, and could go longest without food. And it was also forcing some of them to break their oath, and commit a kind of necessary perjury. . . . I must confess, I think those reflections just; insomuch that I am convinced that this unanimity could never have been required in the original institution of juries, but must have grown up from some accidental

and collateral cause in the practice of this mode of trial, as for example, from the unwillingness of Judges to take the trouble of adding a number of fresh jurymen to the first twelve, where they could not agree in their verdict, and causing the evidence, that had been before given in the cause before the first twelve jurymen to be repeated over again by the witnesses to the original jurymen, till a verdict was obtained, in which twelve at least, out of the whole number of jurymen, were really unanimous. For this was the way of proceeding in this matter in the days of King Henry III., that is, about the year 1260 (or about fourscore years after the first institution of juries by King Henry II.) as, appears by the following passage in the famous lawyer, Bracton."

Baron Maseres then quotes a passage from Bracton "De Legibus," &c., lib. 4, c. 10, which he gives a free translation of as follows :—

"It often happens that jurymen, when they come to deliver their verdict, appear to be of different opinions, so that they cannot bring in an unanimous verdict. In that case, the Court must order the assize or jury to be reinforced, or increased by the addition of as many new members as there are in the majority of the jury who already agree in one opinion and differ from the minority, or at least by the addition of from four to six new members. And these additional members of the jury shall join with the former jurymen in considering and debating the matter in question. Or they may, if the Court shall so direct, consider and debate the matter in dispute by themselves, without any such conjunction with the original jurymen, and give their answer concerning the matter in dispute, separately by themselves. And the verdict of these members of the original jury with whom these new jurymen shall agree in opinion, shall be allowed and held good."

And, accordingly, in his plan of administering justice in the Province of Quebec, the Baron proposed that a majority of jurymen should carry the verdict.

Mr. Warrington (Obs. on Magna Charta, c. 29) inserts part of the above passage from Bracton, and remarks that this continued to be the practice in the next reign when Fleta is supposed to have written. In confirmation he quotes a passage from Fleta, which, says he, "shews, that the Judge had a power of insisting upon the unanimity of the first jury impanelled; and it was probably found, when new jurors were added, that it was in reality the trouble of trying the cause over a second time, and so *toties quoties*; at last for the greater despatch of business, they insisted in all cases upon the unanimity of a jury." The above passage from the old work of Baron Maseres not only suggests the same arguments against the unanimity which are used by more recent critics (amongst others some of the writers to the *Times*, on the occasion of the Mainwaring verdict); but, in its historical account of the matter, it is in harmony with the account by Mr. Forsyth, in his work above mentioned. The Imperial commissioners appointed in 1830, to report upon the Courts of Common Law, recommended a change in this matter, and suggested that, after a certain fixed period of deliberation, if any nine of the jury concur in giving a verdict, such verdict should be entered on record; and in a failure of such concurrence, the cause should be made a remanet. But, as our friend of the *Albany Law Journal* says: "institutions cling to the people who adopt them, as the Old Man of the Sea clung to Sinbad, refusing to be shaken off." No change resulted from the recommendation of the commissioners, and although it may no longer be true that—

"Hungry Judges soon the verdict sign,
And wretches hang that Jurymen may dine,

it appears from the Mainwaring verdict, that wretches have a good chance of hanging, that jurymen may be relieved from the trouble of fulfilling their solemn oath to "well and truly try, and a true verdict give, according to the evidence."

SELECTIONS.

A NEW HEAD OF EQUITY.

In an action of *Betts* v. *Doughty*, tried last week before Sir James Hannen and a special jury, a new head of equity was "evolved;" and, although no definite decision as to its validity was rendered by reason of the dispute between the parties being settled, yet the matter amply deserves the notice of the profession. From the facts proved in the course of the plaintiffs' case, it appeared that Miss Doughty, who died last year, aged seventy-nine, had made a will in 1853, by which she directed her real and personal estate to be sold, and the moneys realized from the sale to be divided equally between her brothers (two in number) and her sister. Her brothers and her sister predeceased her, all leaving issue. The children of the sister—namely, Major Betts and Miss Betts—propounded the will and were plaintiffs in the action; the eldest son of the eldest brother was defendant in the action, and as heir at law opposed the will on the ground of the incapacity of the testatrix; and the children of the other brother appeared as interveners in the action. In the course of the plaintiffs' case, counsel for the defendant cross-examined the witnesses who gave evidence in support of the will, not only for the purpose of proving the plea of the incapacity of the testatrix, but also for the purpose of showing that twenty years after the will had been made, the testatrix was desirous of executing a new will depriving the plaintiffs in the action of all benefit under her will of 1853, and transferring that benefit to the defendant, his brother, and the interveners, and that she was prevented by the threats of the plaintiffs from executing this further will. Enough was elicited in cross-examination to make out a *prima facie* case to this effect; and, therefore, at the close of the case for the plaintiffs, counsel for the defendant applied to the judge to be allowed to amend the statement of defence, by adding a paragraph to the effect that the testatrix was prevented, by the threats of the plaintiffs, from executing the draft will excluding the plaintiffs from all interest under the will of 1853; and also by adding a claim that the plaintiffs should be declared to be the trustees of the share bequeathed to them by the will of 1853, for the benefit of the defendant, his brother, and the interveners. In spite of the opposition of the plaintiffs' counsel, Sir James Hannen allowed the statement of defence to be so amended; and his lordship also allowed the interveners to put in the same pleading, and ask for a like declaration. However, upon his lordship's suggestion, the parties wisely compromised the dispute, and the will of 1853 was pronounced for upon terms. We believe that no case of this kind is to be found in the whole history of equity jurisprudence, and that there is, therefore, no precedent for the plea. But, if the plea is bad, then it would seem to follow that a party who knew that a testator had made a will in his favour might, by actual force, prevent the testator from changing the disposition of property, and so take advantage of his own wrongful act. The novelty of the equity set up is sufficient to enforce its claim to legal attention, as, although no case of the kind has occurred in the past, the future may bring forth fresh instances. It is worthy of observation that, before the Judicature Act, the parties could not have raised such an issue in the Court of Probate, but would have been driven to file a bill in Chancery to assert the claim.—*Law Journal.*

JOTTINGS FROM OUR CONTEMPORARIES.

The Law Times in an article entitled "Mr. Justice Hawkins and the Statute of Frauds," criticises the recent interpretation in *Davey* v. *Shannon* (40 L.T.N.S. 628) of the 4th section of the Statute of Frauds, which enacts that "No action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof," &c. In this case the defendant entered into a certain employment for a term of three years on certain terms, and at the end of the period continued in such employment upon the like terms, except as to the period, until 1877. Then occurred the breach alleged. The defendant pleaded the statute, and

the plaintiff demurred. The agreement sued upon, viz., the one established after the expiration of the three years, was therefore one the duration of which was co-extensive with the defendant's life, and might be broken by him at any time. Nevertheless, Mr. Justice Hawkins held it was not within the Statute of Frauds. This the *Law Times* maintains is inconsistent with Mr. Justice Hawkins' own statement in the case of the general principle on which the section is interpreted, viz., that "a contract which *prima facie* and from its terms may be performed within a year, however improbable that it will be so, does not fall within the statute, and it is immaterial that the performance of it is by the natural course of events delayed for a much longer period." This general statement the *Law Times* entirely accepts, as supported by a long series of decisions and *dicta*. It thinks that these decisions, a résumé of which is contained in the judgment, instead of supporting his Lordship's conclusion in the case, bear out the opposite conclusion, with one exception. This exception is *Eley* v. *The Positive Life Ass. Co.* (L. R. 1 Ex. Div. 20) in which there certainly is *an expression of opinion* by the Court of Exchequer that the analogous case of a contract by which it was agreed that plaintiff should be solicitor to the Company, and should not be removed from his office except for misconduct, was within the Statute. Of the other cases cited, the *Law Times* maintains that *Farrington* v. *Donohoe* (Ir. Rep. 1. C.L. 675) when a parol agreement to maintain a child of about five years old until she should be able "to do for herself," could not be sued on, though the child might die within the year, does not really support Mr. Justice Hawkins, because the ultimate time fixed for the completion of the contract—*i. e.*, when the child should be able "to do for herself"—was necessarily more than one year distant, while *Murphy* v. *O'Sullivan* (11 Ir. Jur. N.S. 111) directly establishes the *Law Times*' view of the question. The writer selects *Fenton* v. *Emblers*, 3 Burr. 1278, a case more than a hundred years old, and frequently followed and relied upon as especially strong in favour of his contention that in *Davey* v. *Shannon* ubi. sup. the judgment should have been for the Plaintiff. Summing up he declares that in all those cases "in which writing was held necessary it will be found on examination that the period primarily appointed for performance, though perhaps not definitely fixed, was of a certainty more than a year distant, while in those in which a parol agreement has been held sufficient, such period might have arrived within the year."

In a recent article the *Albany Law Journal* discusses and classifies the various classes of cases in which photographs have been admitted as evidence. These it enumerates as follows: (1) From necessity, as e. g. to present accurate copies of public records which cannot be permitted to be withdrawn from the files: *In re Stephens*, L.R.G.C.P. 187; *Leathers* v. *The Salvor Wrecking Co.*, 2 Wood, 682; *Daly* v. *Maguire*, 6 Blatch. 137; *Luco* v. *U. S.* 23 How. 515. (2) For the purpose of identification of an individual: *Udderzook* v. *Commonwealth*, 76 Penn. St. 340; *Luke* v. *Calhoun Co.*, 52 Ala. 118; *Ruloff* v. *People*, 45 N.Y. 213. In all these cases there were other evidences of identity. See also *Washington Life Ins. Co.* v. *Schaible*, 1 Weekly Notes of Cases, 369. (3) To identify and describe premises in dispute: *Blair* v. *Pelham*, 118 Mass. 421; *Cozens* v. *Higgins*, 33 How. Pr. 439; *Church* v. *Milwaukee*, 31 Wis. 512. In this last case the action was to recover damages for an injury to plaintiff's premises by reason of the change of a grade of a street, and the Court held, (citing *Ruloff* v. *The People*, 45 N.Y. 213) that a photograph of the premises proved to be correct was properly admitted, it being impracticable for the jury to view the premises. *Locke* v. *The S.C. & P.R. Co.*, 46 Iowa, 109 is also in point. (4) As an aid upon questions of disputed hand-writings in addition to the writings themselves. The general practice is to receive enlarged photographs of the writings, which serve to point out and emphasize peculiarities of the hands. Thus *Marcy* v. *Barnes*, 16 Gray 161. But even in this class of cases such evidence has not universally been tolerated; e. g. *re Foster's Will*, 34 Mich. 21. Here the Court said: "The original and not the copy is what the jury must act

upon, and no device can properly be allowed to supersede it. * * * It would be an unauthorised assumption to hold that Courts should be compelled to receive additional and supplementary proofs which are neither necessary nor admissible before, and which are at best merely convenient aids to enable juries to dispense with the primary evidence." So too *Tome* v. *Parkersburgh Branch R.R. Co.*, 39 Md. 603. Here the photographs were rejected, the Court observing: "As a general rule, as the *media* of evidence are multiplied, the chances of errors or mistake are increased. Photographs do not always produce exact *fac-similes* of the objects delineated." Letter-press copies have generally been rejected: *Commonwealth* v. *Eastman*, 1 Cush. 189; *Commonwealth* v. *Jeffries*, 7 Allen, 561; *Wilkins* v. *Earle*, 44 N.Y. 172. The *Journal* remarks that, in respect to letter-press copies, it is a little troublesome to discover the objection to them where there is no question of genuineness of hand-writing, but where the object is simply to introduce the contents of an undisputed document or letter. Lastly in *Eboru* v. *Zimpleman*, 47 Tex. 503; s. c., 26 Amer. Rep. 315, the case which apparently suggested the long article we have analysed, on a question of the hand-writing of A in Texas, the Court held that the depositions of witnesses in another State testifying that if certain photographic copies of the writings in question were exact, the original writings were in the hand of A, to be inadmissible: (1) because they were secondary evidence: (2) that the mere fact that the original writings were on file in a Texas Court, and thus could not be produced to the witnesses in the other State, did not authorize their admissions; (3) because the witness did not know the hand-writing of A.

In the *Banker's Magazine* (Amer.) is a long and interesting article on the effect of the death of the drawer of a cheque. The author maintains that the principal writers on Bills and Notes have fallen into a capital error in this matter. They lay it down, more or less positively, that *the death of the drawer is a revocation of the authority*, but that if the bank pay without knowledge of the drawer's death, the money cannot be recovered back, and the payment is good. (Edwards on Bills, p. 546; Byles on Bills, 5th Am. Ed. by Sharswood 101; 2 Parsons, N. and B. 81, 82; Chitty on Bills, 13 Am. Ed. 484.) Morse, in his work on banking, also states the same, but adds: "It must be acknowledged that the cited case of *Tate* v. *Hilbert*, 2 Ves. jr. 111" (decided in 1793), "which the text books all rely upon as their sole authority for the statement, does not touch upon the point, and furnishes no basis for considering that the rule has the support of a single adjudicated case." The writer in the magazine shows that Morse is correct in this, and that it is only from *obiter dicta* of Lord Loughborough that the text writers have deduced the above doctrines. Thus the Lord Chancellor said, as to the holder of the cheque, unpaid at the time of the death of the drawer: "If she had paid this away, either for a valuable consideration, or in discharge of a debt of her own, it would have been good; *or even if she had received it immediately after the death of the testator before the banker was apprised of it*, I am inclined to think no Court would have taken it from her." This is a mere cautious statement of what the Lord Chancellor conceived to be clear, and moreover the text-writers have illogically inferred that, because the cheque holder could have retained the funds if paid her after the drawer's death, and before the banker was apprised of it, and because the banker would have been justified at making payment, when he had no notice of the death, therefore the banker would not have been justified in making the payment if he had been apprised. As to that circumstance the Lord Chancellor simply withheld his opinion, after already going further than was needful to the decision of the case.

The writer than proceeds to examine the question on principle. (1) The authorities agree in describing a cheque as a species of bill of exchange. But in the case of a bill of exchange the death of the drawer is no revocation of the request to accept, and the drawee may accept and pay. (Chitty on Bills, 13 Am. Ed. 325. 1 Parsons, N. and B. 287.) Parsons saw the inconsistency, and in vol. I., p. 287, note 6, after quoting th

passage from Chitty, and the statement of Byles, that "the death of the drawer of a cheque is a countermand of the banker's authority to pay it," says the two propositions are irreconcileable. (2) A cheque is a negotiable instrument, and as such carries the presumption that it was given to the payee for value (Dan. on Negotiable Instruments § 1,646). This being so the payee may sue the drawer, if it be not paid, or his executor if he be dead; and any person may buy the cheque, or receive it in discharge of a debt, and recover upon it against the drawer. Is it not then curious and illogical to hold that the bank, under the like circumstances, should not pay it? It has never been intimated that a third party cannot acquire a cheque without inquiry after the drawer's death. Why, then, may not the banker pay it? (3) It has been urged that the death of the drawer is "a revocation of the banker's authority to pay the cheque," as if it were an instrument to be governed by the law of agency—a mere mandate. (Thomson on Bills, 244). A cheque is more than this. If it is an authority to the banker to pay the amount,—it is also an authority to the payee or other holder to receive the amount. As a negotiable instrument it imports a valuable consideration, therefore it is presumably an authority coupled with an interest. As such it is irrevocable. Therefore we reach this paradoxical conclusion: "that an authority coupled with an interest may be practically revoked and annulled by the revocation of another authority not coupled with an interest," which, says the writer, is a *reductio ad absurdum*. (4) It is universally conceded that a cheque operates as an assignment of the fund *pro tanto*, as soon as the bank consents to it, by certification or payment. The drawer has given the holder a written instrument authorizing the latter to apply to the drawer for the assignment of certain funds. It is hard to see how the death of the party who has consented can annul the right of another to acquiesce and concur in his act. Professor Parsons evidently takes this view. (2 Parsons N. and B. 287 note.) (5) No doubt if the cheque were a gift to the payee, and the banker knew that fact, the death of the drawer would operate as a revocation of the banker's authority to pay it. But in such case the authority to donee to collect, as well as that of the banker to pay, is not coupled with such an interest as to continue them in force: *Burke* v. *Bishop*, 27 La. An. 465 (1875). But the banker is not to presume that a cheque is a donation.

Cutts v. *Perkins*, 12 Mass. 206, appears correctly to state the law; and *Billing* v. *De Vaux*, 3 Man. & G. 565, seems to be direct authority as against the inferences which have been drawn from *Tate* v. *Hilbert*. The writer sums up his conclusions thus: "Rights accrue upon the delivery of a bill or cheque to the payee. They are not varied by the subsequent death of the drawer. The drawer of the bill may accept and pay it; the drawee of the cheque may also honour it; for it is presumably given for consideration, and its payment operates for the benefit of the estate of the deceased, which, upon its dishonour, would be bound for its payment and of general assets."

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

SINGLE COURT.

Attempt to obtain information as to voting —R. S. O. ch. 174, sec. 162—Conviction—Costs—Amendment.

There is no general power to award costs upon a conviction under an Ontario Statute where such power is not given by the Statute itself; and therefore where, on a conviction under sec. 162, ch. 174, R. S. O., for attempting to obtain information at the polling place, as to the candidate for whom a voter was about to vote, costs were awarded against the defendant, the conviction was ordered to be quashed, the Court refusing to amend the same in this respect, as it had been brought up on certiorari.

Milligan for plaintiff.

R. M. Fleming, contra.

IN BANCO.

Nasmith v. Dickey et al.

R. W. Co.—Action by judgment creditor against shareholder.

N. D., one of the defendants, having a claim against a railway company for $1,000, assigned it to one H. by an instrument absolute in form, but really in trust, to enable H. to sue first the railway company and then the defendants, as shareholders of unpaid stock of the company. H. accordingly recovered judgment against both the company and the defendants, but made no effort to realize on that against the latter. After the commencement of this action, however, which was by a judgment creditor of the railway company against the defendants as shareholders of the company, for their unpaid stock, defendant's solicitors gave a cheque for the $1,800 to H., who, after retaining $127, the amount of a claim he had against N. D., handed over the balance to him, and the defendants then set up as a defence to the action this payment under the judgment recovered by H. against them; but, *held*, on the facts in evidence, that the judgment so recovered against the defendants and alleged payment thereon, constituted no defence to the claim of an ordinary judgment creditor, and that in fact the stock of the present defendants had not been paid up to the extent of $1,800, which was therefore liable to plaintiff's claim.

Held, also, Hagarty, C. J., diss., that plaintiff could recover the interest on the calls made by the company for that amount of the stock.

Proctor for plaintiff.

J. K. Kerr, Q. C., contra.

Mitchell v. Goodall.

Equitable assignment of non-existing fund—Assignment of chose in action—R. S. O. ch. 116.

One W., plaintiff's tenant, being in arrear for rent, and having wheat in the barn, had a settlement with the plaintiff, when the plaintiff told him he must give him security before he would allow him to ship his grain. It was agreed that the plaintiff should see the defendant, to whom W. had been in the habit of shipping his produce, and ascertain whether he would accept an order from W. for the grain. The defendant agreed to accept the order which he drew out, mentioning, however, no amount. Plaintiff and W. then saw the defendant, when W., in the defendant's presence, signed an order on the defendant for $299.85 in the plaintiff's favour, which the defendant said he would pay as soon as he realized on the grain. There was conflicting evidence as to whether the plaintiff did or did not tell the defendant that, unless he got the order, he would not let the grain go; but he admitted that he drew the order, and its execution by W., and that he told the plaintiff he would pay it. The grain had not at that time been, but was on the 4th of October following, shipped to the defendant, who subsequently sold it and paid the proceeds to W., who had verbally instructed him before the receipt of the grain not to pay the order in the plaintiff's favour, though written instructions to that effect did not reach him till after its receipt.

Held, that the plaintiff was not entitled to recover as on an assignment of a chose in action under R. S. O. ch. 116, but, *Held*, Cameron J., dissenting, that the property was stamped with the equitable right, and that the defendant was not merely cognizant of such claim, but had promised to co-operate in enforcing it, and that when the property reached his hands he was bound to carry out the trust, and no interference on W.'s part could relieve him from the obligation.

Per Armour, J.—That the plaintiff was entitled to succeed on the common counts.

Per Cameron, J.—That at the time of the order claimed by the plaintiff to constitute an equitable assignment, there was no fund in existence upon which it could operate, and no contract proved that W. would deliver the grain to the defendant; that W. was, therefore, at liberty to make any arrangement he pleased with defendant, and when he delivered the grain to him, after notifying him not to pay the order, the defendant must be held to have received it

on the understanding that he would not pay it.

Rose for plaintiff.

McMichael, Q.C., contra.

Backus v. Smith.

Easement.

Plaintiff, tenant for years, sued for injury to his stock-in-trade, caused by his wall falling from defendant's excavation on an adjoining lot. The wall had been over twenty years old, but there had been unity of seisin of both lots for a year, about the middle of the period. The plaintiff's landlord sold defendant's lot in fee.

Held, that no easement had been acquired by lapse of time.

Held, also, Cameron, J., diss., that there was evidence of negligence in fact, causing damage, and that the plaintiff could therefore recover, irrespective of any acquired easement.

Held, also, that lateral support to land in its natural state is a right of property; that right to support for buildings is an easement; and that such an easement is not within the Prescription Act.

Quære, whether, on the authorities, the landlord, when he conveyed defendant's lot, did, by implication of law, reserve the right of support to his then existing wall, and guaranteed thereby assent to such reservation.

Remarks on the law as to damages, where the land is weighted with buildings.

Per Cameron, J., that the evidence did not disclose negligence, entitling plaintiff to recover.

Atkinson for plaintiff.

C. Robinson, Q. C., contra.

COMMON PLEAS.

IN BANCO.

[Sept. 17.

Hovey v. Cassels et al.

Cheque or order on firm—Acceptance by partner not in firm name—Bona fides—Liability.

The defendants R. S. and W. G. Cassels, and A. B. Campbell carried on business in partnership as stock brokers and financial agents, under the name of Cassels, Son & Co. By the articles of partnership it was required that all bills, drafts, cheques, promissory notes, &c., should be signed in the name of the firm by some one or more of the said partners or the majority of them, for that purpose. It appeared that Campbell and one L. were engaged in some private transactions in no way connected with the business of the firm, and of which the other members had no knowledge, and in the course thereof, L., who had no funds in the firm's hands for the purposes thereof, drew the following order on the firm:

"Toronto, June 27, 1878.

"Cassels, Son & Co.

"Pay to A. Henry Hovey, Esq., or order $600."

(Sd.) "R. C. Lean."

which he took to Campbell, who, without any authority from the firm, marked across it "good, A.B.C.," and then procured the plaintiff to discount, at a discount of 30 per cent. per annum, and to hold it for one month, at the expiration of which, the firm having been dissolved in the mean time, the plaintiff presented the order, and it was refused, when he brought an action against the firm.

Held that the plaintiff could not recover, for the acceptance was not by the firm; but even if it was, the evidence showed that it was not taken by plaintiff in good faith.

McMichael, Q.C., for the plaintiff.

J. K. Kerr, Q.C., *and W. G. Cassels* for the defendants.

[Sept. 17.

Donley, Assignee, v. Holmwood.

Joint-stock Co.—Power of directors to make assignments in insolvency without consent of shareholders.

Held that the directors of a joint-stock company, incorporated by letters patent under the Joint Stock Letters Patent Act, 32 and 33 Vict., ch. 13, D., and subject to the provisions of the Insolvent Act of 1875, cannot, without the consent of the shareholders, make a voluntary assignment under that Act.

McCarthy, Q. C., for the plaintiff.

Falconbridge for the defendants.

[Sept. 17.

AYRE v. CORPORATION OF TORONTO.

Municipal corporation—Depositing ashes on street—Notice—Evidence.

Action for injuries sustained by the plaintiff by reason of the carriage in which he was driving coming in contact with a quantity of ashes and rubbish left by one S., on one of the streets of the City of Toronto, on the evening before the accident occurred, to be removed by the city scavenger carts on the following morning. There was no evidence of express notice to or knowledge by the defendants of the ashes being there : but it was urged that notice must be implied because the corporation officials whose duty it was to remove them had sanctioned the practice of so depositing ashes, &c., by permitting it to be done on former occasions, but the evidence failed to substantiate it.

Held, under these circumstances, the plaintiff could not recover

J. Reeve for the plaintiff.

McWilliams for the defendants.

[Sept. 17.

MERCHANTS' BANK v. MCDOUGALL.

Promissory note—Notice of protest—Sufficiency of proof of sending—New trial.

In proof of the sending of notice of dishonour to defendant, an endorsee of a note, the receipt of which was denied by the defendant, the plaintiffs produced the notarial protest shewing that the note was presented for payment and protested on the 3rd of February, 1879, the day on which it fell due, and that notice of dishonour was sent on the same day to the maker and endorsers of the note. The notary's clerk stated that the protest was in his handwriting, and that he had no doubt but that he mailed the notices to the endorsers. He produced the office book, or notarial register, containing the date of the protest and particulars of the note, with the notarial and postage charges, and the time of mailing, with the initials of the person by whom the note was presented and the notices mailed, the latter being his own, but he had no recollection of such mailing except from what appeared in the book, and his practice was to make the entries just before mailing, when he would take out his watch, note the time, and then go to the post.

Held, that there was sufficient evidence of the mailing the notices, and the jury having found for the defendant, a new trial was ordered.

H. J. Scott, for the plaintiffs.

Meek and *Norris*, for the defendant.

[Sept. 17.

KNEESHAW v. COLLIER.

Promissory note in settlement of indictment for assault and civil action therefor—Validity of—Fraud—Duress.

To an action against defendants C. and B., as maker and endorser respectively of a note for $1000, the defendant C. pleaded—1. Fraud. 2. That he was induced to make the note by the duress of the plaintiff, namely, by his unlawfully imprisoning and detaining him in prison until he made the note ; and both defendants pleaded, 3. Setting up in substance illegality of consideration ,namely, that the giving of the note was the result of an illegal compromise of an indictment for an assault occasioning actual bodily harm, and for common assault ; and also of a civil action against C. for such assault.

Held, upon the evidence set out in the case, none of the pleas had been proved and that plaintiff was therefore entitled to recover.

B. B. Osler, Q. C., for the plaintiff.

Robertson, Q. C., for the defendant.

[Sept. 17.

WALTON v. COUNTY OF YORK.

Ways—Accident—Negligence.

In an action for injuries sustained by the plaintiff's horse and buggy falling into a ditch on the side of a road in the County of York, known as the Kingston Road, the plaintiff claimed that there was negligence on the part of the defendants, because the ditch was too near the travelled part of the road, and was too deep : that the ditch should have been graded down to the bottom, as is done in cities and towns, and further, that the ditch should have been fenced.

It appeared that the road which ran east and west was 59 feet wide between the fences, the actual travelled part being 30 feet, bounded on either side by a ditch; the southerly 10 feet of which, and 18 inches from the ditch in question, was macadamized. The ditch was about 4 feet wide at the top, sloping to about 2½ feet at the bottom, and its depth was 15 inches from the edge of the ditch; 22½ inches from the extremity of the macadamized part, and about 28 inches from the crown of the road.

Held, that there was no evidence of negligence, for that the ditch was proved to be where ditches are usually placed in county roads, and was not deeper than was necessary to carry off the water; that it was not incumbent to so grade the ditch, for that it had been tried and found not to answer, because waggons and cattle passing over the road caused it to be filled up; nor were they required to fence it, for not only was it most unusual to do so, but also, it would be most expensive, and it would be impossible to keep up the fences or repair them; and that such fences would be more dangerous and a greater nuisance than the ditch itself.

Donovan for the plaintiff.

J. K. Kerr, Q.C., for the defendants.

[Sept. 17.

Lee v. Bank of British North America.

Deposit receipt—Payment after death without knowledge thereof to holder—Action by administratrix—Pleading.

Action by plaintiff, as administratrix of one L., deceased, to recover $100, deposited by L., in his lifetime, with defendants.

Second plea: That the moneys claimed are claimed under the deposit receipt and not otherwise, which receipt was, after L.'s death, and before defendants had any notice or knowledge thereof, duly presented to defendants, properly endorsed by L., and that defendants, in due course of business and in their usual course of dealing with such receipts, paid the sum mentioned therein to the persons presenting the same with L.'s endorsement thereon, and defendants took up and ever since held the same, as they were entitled to do.

Third plea: After stating, as before, that the moneys were claimed under the deposit receipt, alleged that L., in his lifetime, endorsed and delivered the said receipt to B. L., his wife, and afterwards his widow, who being possessed thereof by virtue of the endorsement, presented it to defendants, who, without any notice or knowledge of L.'s death, duly paid the same to her.

Held, both pleas bad, as constituting no defence to the action.

Ferguson, Q.C., for the plaintiff.

McMichael, Q.C., for the defendants.

[Sept. 20

Lewis et al v. Tudhope et al.

Insolvency—Proof by surety—Action by creditor.

The defendants having become insolvent, the plaintiffs who were creditors having refused to prove, G. F., who was surety to the plaintiffs for the amount of their claim, without having paid the debt, proved against the estate therefor, fearing, as he alleged, that, unless he did so, the claim would be unrepresented, and that in the event of his being compelled to pay plaintiffs, he would have no recourse against the estate. One R., who was surety for other creditors, proved in like manner. The proof of these claims was received without objection, and a deed of composition and discharge executed, and subsequently confirmed by the County Judge. It was admitted that unless one or other of these claims was counted, the deed was not executed by creditors whose claims amounted to three-fourths in value of the liabilities so as to make the deed binding on non-assenting creditors. By the deed the insolvents covenanted to give each of the creditors promissory notes for the composition payments. After the deed of composition had been confirmed, and the estate handed back to the insolvents, the plaintiffs sent to the assignee proof of their claim, valuing their security, which the assignee refused to accept, on the ground that the estate had passed out of his hands.

The plaintiffs sued defendants under the common counts for the whole amount of their claim, alleging that the deed was fraudulent and void, as against them; and in a special count for the amount of the

composition, alleging neglect of the defendants to give plaintiffs the said notes.

Held, under the circumstances and state of the record, the plaintiffs could not recover the whole amount of their claim; but that they were entitled to recover the amount of the composition on their claim after deducting the value of their security.

McMichael, Q. C., for the plaintiffs.

McCarthy, Q. C., for the defendants.

[Sept. 20.

Starling v. Grand Junction R. W. Co.

Railways—Agreement for compensation for lands taken in the absence of notice, or of proceedings taken under the Act—Validity of—C. S. C., c. 66.

In an action against defendants, a railway company, for compensation for land taken by them, it appeared that in 1864 the railway company without giving any notice, or taking any proceedings for acquiring the land under the provisions of the Railway Act, Consol. Stat. C., ch. 66, entered upon the land and constructed their railway. No settlement was made with plaintiff, though he frequently demanded compensation until 1878, when on his threatening to take proceedings against the company the president, on authority therefor from the board, instructed the secretary to make a settlement, and he, after seeing plaintiff and making a valuation of the land, entered into an agreement with plaintiff, whereby plaintiff agreed to accept $1775, and interest at 6 per cent. from the time the land was taken, making in all $2199, the valuation being shown to the president who expressed no dissent. The written memorandum of the valuation was given to the plaintiff, and a copy placed amongst the records of the company. No resolution of the board was passed in regard to the valuation, nor was any formal contract ever drawn up, but it appeared that the valuation was before the board when making their contracts for the construction of the road. It also appeared that the defendant tendered a conveyance of the land to the company, and their only objection thereto was that they were unable to pay the money.

Held, that, under the circumstances, the plaintiff was entitled to recover the amount so agreed upon as compensation for the land, and interest.

Britton, Q. C., for the plaintiff.

McCarthy, Q. C., for the defendant.

VACATION COURT.

Osler, J.] [August 22.

Walker v. Beaver, &c., Ins. Co.

Insurance—Action on policy—Right to appeal on merits—Cancellation—Evidence.

In an action on a fire insurance policy, the learned judge at the trial by consent of the parties directed a reference, which did not contain any agreement, allowing an appeal on the merits. *Held*, by *Osler*, J., that such an appeal would not lie.

Semble, that except by consent of parties there is no power in such case to direct a reference.

Semble also, that the evidence set out in the case sustained the finding of the arbitrators herein, that at the time of the loss the insurance in defendants' company had been cancelled, and a new and valid insurance effected in another company.

Ferguson, Q.C., for the plaintiff.

Robinson, Q.C., for the defendants.

CHANCERY.

The Chancellor.] [Sept. 3.

Hepburn v. Patton.

Injunction—Debtor and Creditor.

This Court will not restrain a debtor from dealing with his property at the instance of a party representing himself to be a creditor, but who is not in a position to ask for a decree establishing his claim against the defendant.

The Chancellor.] [Sept. 3.

Dewar v. Mallory.

Fixtures—Freehold or Chattels.

The owner of a mill, originally constructed for the purpose of sawing, afterwards added to it machinery for planing the lumber, and subsequently executed a mortgage of the land and a chattel mortgage of the machinery, treating and calling it "chattels." *Held*, that the mortgagee of the

realty had no right to look to the machinery as security for his claim, although in the absence of the acts of the owner in severing the machinery from the realty it would have been considered part of the freehold.

The Chancellor.] [Sept. 3.

GRIFFITH v. BROWN.

Easement—Absolute Title—Statute of Limitations.

The plaintiff, for the purpose of obtaining ready access to the upper part of his house, constructed a platform, stairway, and landing on the outside of his building, and the defendant, the adjoining owner, never took any proceedings against the plaintiff, or protest against the user of the premises. *Held*, that after the lapse of the time prescribed by the statute of limitations, the plaintiff had acquired not only an easement in the premises but a title to the land covered by the platform, stairway and landing; and the fact that during the time the plaintiff was in possession the defendant had, for the purpose of carrying out some works on his own lands, temporarily taken up the platform, and removed a portion of the stairway, had not the effect of stopping the running of the statute, the acts referred to not being shown to have been done in assertion of any right on the part of the defendant.

The Chancellor.] [Sept. 3.

THE CANADA LIFE ASSURANCE CO. v. PEEL GENERAL MANUFACTURING COMPANY.

The holding of shares by one trading company in another trading company is not ultra vires.

The rule that, in the absence of fraud on the part of a vendor of land, a deficiency in quantity—small in proportion to the quantiyt sold—that which is deficient not being necessary to the enjoyment of what the vendor can make title to, is not a bar to specific performance at the suit of the vendor with compensation to the purchaser, applies also to sales of stock or shares in a trading company. Therefore, where a contract was entered into for the sale and transfer of 360 (out of 400) shares of stock in such a company, and upon a bill being filed to enforce the sale and purchase, it appeared that the plaintiffs could validly assign 343 out of the 360 shares, the Court at the hearing held the vendors entitled to a decree for the sale and payment of such a number of shares as they could make a good title to.

The Chancellor.] [Sept. 3.

DEEKS v. DAVIDSON.

Presbyterian Churches—Church Property—Dissent from Union.

In pursuance of notices duly given from the pulpit by the officiating clergyman, a a member of the United Presbyterian body and belonging to the Presbytery, a meeting of the congregation was held, at which the members unanimously passed a vote of dissent from the union. *Held*, that such dissent entitled the congregation to hold its property as it had held it before the Act of the Legislature was passed for the purpose of uniting the several bodies of Presbyterians in Canada.

The Chancellor.] [Sept. 3.

FAIR v. YOUNG.

Husband and Wife—Fraud.

Where the evidence showed that a husband had received moneys from his wife, for which she claimed to be his creditor, these moneys having in great part been produced by sale of her lands, and she subsequently obtained moneys from her husband, which she expended in the purchase of land; a bill, filed by a creditor of her husband, seeking to enforce his claim against the property so purchased, was dismissed with costs, the Court being satisfied with the *bona fides* of the dealings between the husband and wife, although there were some slight discrepancies in their evidence.

The Chancellor.] [Sept. 3.

CORPORATION OF HOUGHTON v. FREELAND.

Liability of Collectors for money destroyed by fire.

The defendant being collector of rates, kept a large amount of his collections in his house, there being no proper place for depositing the same provided by the munici-

pality, and there being no bank in the county within a distance of thirty-five miles. *Held*, that under these circumstances the defendant was not liable to make good to the county the amount of loss sustained by the accidental burning of his house, and the destruction therein of moneys of the municipality.

The Chancellor.] [Sept 3.

Sills v. Bickford.

Wharfinger—Lien for Wharfage.

It is not necessary that the proprietor of a wharf or quay upon navigable waters, used for the loading and unloading of vessels, should have a warehouse or shed or other convenience for the storage of goods and protection thereof from the weather; and as such wharfinger he is entitled to a lien on goods, for money due to him for wharfage.

Proudfoot, V. C.] [Sept. 4.

Fraser v. Gunn.

Dower—Agreement to divide rent.

The rule of law is that if a woman accepts an assignment of dower against right she will be bound by it; but where the heir-at-law and widow agree to lease the realty and pay the widow one-third of the rent reserved in lieu of dower, which was carried out by their executing a lease of the premises, and the subsequent payment to her of her agreed proportion of the rents during the continuation of the lease,

Held, That the right subsequently to claim dower was not barred by the Statute of Limitations.

Proudfoot, V. C.] [Sept. 4.

Moffat v. School Trustees.

School trustees—Change of school site—Specific performance.

Where the Board of Education formed by the Union of High School and Public School Trustees contracted for the purchase of land from the plaintiff for the purpose of changing the place of the school.

Held, That the plaintiff was entitled to call for a specific performance of the agreement for purchase, although no by-law of the Council authorizing the purchase had been made, nor had the Lieutenant-Governor in Council approved of the change, and although proceedings had been instituted by a ratepayer to restrain the change of site.

Proudfoot, V. C.] [Sept. 4.

Re Yarmouth.

Welsh mortgage—Statute of Limitations.

A conveyance was made by way of security declaring that the mortgagee should retain possession until the sum of $75 was paid.

Held, that the title of the mortgagee did not become absolute under the Statute of Limitations, the conveyance in effect amounting to a Welsh mortgage under which the possession of the mortgagee gives no title under the statute; every receipt of rent or every year's occupation of the premises being a receipt of interest under the mortgage, the right of redemption is thus kept alive.

Blake, V. C.] [Sept. 11

McIntosh v. Bessey.

Will—Construction of—Extrinsic evidence—Latent ambiguity.

A testatrix devised certain parts of her estate to her "daughter." In fact the testatrix at the time of making her will had two daughters, one of whom had some years before married against the will of her mother, and with whom, in consequence, she had ever since ceased to have any social intercourse. Under these circumstances the Court admitted parol evidence to prove that the unmarried daughter, who had continued to maintain friendly relations with the mother, was the party intended to be benefited by the testatrix.

Blake, V. C.] [Sept. 19.

White v. Lancashire Insurance Company.

Insurance agent—Liability of company.

An insurance agent cannot, without the express sanction of his principals, grant an insurance in his own favour binding on the company; and the same principle prevails in the case of a second insurance, although the prior policy had been granted with the express sanction of the company.

Blake, V. C.]

The Attorney-General v. The International Bridge Co.

Demurrer—Parties—Nuisance.

An information alleged that the International Bridge Company had constructed and completed the said bridge, and the same was adapted to the passage of railway trains and foot passengers; but that the defendants prevented "persons on foot to cross the said bridge, although willing and offering to pay the lawful tolls provided by the said Act," and that the defendants' intention was "to maintain the said bridge as a railway bridge only, and not as a carriage or foot bridge"; and prayed an injunction to restrain the defendants "from preventing Her Majesty's subjects from using the foot-way of the said bridge at their will and pleasure on the payment of lawful tolls" . . . or binding them from using in the same manner the foot-paths thereof. The information also prayed the removal of the bridge in the event of its not being constructed in the manner contemplated by the Act of Incorporation. In view of the fact that a large sum of money had been expended in the construction of the bridge as it was built, and which had been so built in accordance with the provisions of their Act of Incorporation, the Court allowed a demurrer for want of equity; but, in so far as the information showed an unlawful exclusion of the public from the use of the foot-paths of the bridge, the demurrer was overruled; but, under the circumstances, without costs to either party.

To such an information, a railway company who had become lessees of the bridge, were held to be proper parties.

Blake, V. C.] [Sept. 24.

The Western Insurance Co. v. The Provincial Insurance Co.

Re-insurance—Agent of company—Non-payment of premiums

The agent of the plaintiffs effected a re-insurance with the agent of the defendants, but did not pay the amount of the stipulated premium, the plaintiffs alleging that it was the custom of agents to give each other credit for such premiums, and settle at the end of the month, when the balance, if any, was paid by the one to the other. The existence of this custom was denied by the defendants, and it was shown that the defendants required all premiums on re-insurances to be paid to their agents in cash, the same as in ordinary insurances, before the insurance should be considered binding, and this was known to the agent of the plaintiffs. A loss having occurred, the plaintiffs sought to compel payment of the amount of such re-insurance; but the Court, under the circumstances, held that the defendants were not bound by what had taken place between the agents, and dismissed the bill with costs.

Full Court.] [Sept. 24.

The Grand Trunk Railway Company v. The Credit Valley Railway Company.

Injunction—Right of way—License of occupation—Practice.

The principle upon which the Court interferes by injunction is to preserve property in its actual condition until the legal title thereto can be established; and although under the present practice this Court can determine legal rights, still it will not do so upon interlocutory application. Therefore, where two railway companies were in actual possession of a strip of Ordnance lands, 100 feet in width, and along which their tracks were laid, and a third railway company applied for and obtained from the Government of the Dominion a license of occupation of the same strip of land for the purpose of running their track thereon—such license stating that it was not to "operate to imply any covenant or agreement on the part of the Crown to give possession to the licensees, but that such license shall be accepted by them subject to any legal rights, which either the Grand Trunk or the Northern Railway (the two railways so in possession) may hereafter establish in respect of the one hundred feet or any part thereof,"—and in pursuance of such license, the licensees entered upon such strip and proceeded to lay their rails thereon, whereupon a motion was

made by one of the other companies for an injunction to restrain the licensees from disturbing their possession, and which on notice was granted, and a motion made to dissolve the writ was (by Proudfoot, V. C.) refused with costs; on re-hearing this order was affirmed by the full Court with costs.

CANADA REPORTS.

MARITIME COURT OF ONTARIO.

(Reported for the Law Journal *by* J. Bruce, *Esq., Registrar).*

The "Nithsdale."

"Dredge" not within Act.

The owner of the Dredge *Nithsdale* was indebted to the petitioner for services performed on board the said dredge, and this cause was instituted against the dredge to recover the amount due.

The owner of the dredge set up, as a defence, that a dredge was not a ship or vessel within the meaning of the Maritime Jurisdiction Act of 1877, and that the Maritime Court of Ontario had no jurisdiction *in rem*.

Held, That the Maritime Court of Ontario had no jurisdiction.

[Toronto, 19th Feb. 1879.

Mackenzie, Co. J.—This is a cause of wages instituted in this Court by Robert McGraw to recover $757.00 against the dredge *Nithsdale*. The owner, William Pearce, who intervenes as a defendant, alleges, among other things, for answer that the dredge *Nithsdale* is not a ship or vessel within the meaning of any of the Acts of Parliament giving jurisdiction to this Court. The *Nithsdale* is represented as a scow, partially covered with deck, containing boiler, engine and machinery for raising mud, sand, and dirt from the bottom of harbours and waters; she is not propelled by sails, oars, or engine. She has to rely upon tugs or external aid for locomotion, and she has no internal power in herself for navigation. Captain Wyatt states she has propelling powers in harbours, but not *outside* them in open lakes.

The jurisdiction of the Maritime Court is given by 40 Vict., cap. 21. By Section 1 it is enacted:—

"Save as by this Act excepted, all persons shall have, in the Province of Ontario, the like rights and remedies in all "matters, including cases of contract and "tort and proceedings *in rem* and *in personam* arising out of or connected with "navigation, shipping, trade, or commerce "on any river, lake, canal, or inland water "of which the whole or part is in the Province of Ontario, as such persons would "have *in any existing British Vice-Admiralty Court* if the process of such Court "extended to this Province;" and by Section 2, "The Court, &c., shall have as to "the matters aforesaid all such jurisdiction "as belongs in similar matters within the "reach of its process, to *any existing British Vice-Admiralty Court*."

The nearest existing British Vice-Admiralty Court is that of Lower Canada, now the Province of Quebec; also, in the Provinces of New Brunswick and Nova Scotia, the jurisdiction of the existing Vice-Admiralty Courts must be gathered from the Royal Commission creating the Vice-Admiralty Courts and the Letters Patent appointing the Judges thereof, and from the Imperial Statutes passed to regulate the jurisdiction and practice of such Courts explained by adjudicated cases. I have before me a copy of the Imperial Commission directed to "our beloved James Murray, our Captain General, and Governor-in-Chief in and over our Province of Quebec," dated 19th March, 1764.

This Commission gives the Governor jurisdiction to investigate Maritime Causes according to the Ordinances and Statutes of the High Court of Admiralty in England, within the ebbing and flowing of the sea or high water within the maritime jurisdiction of the Province.

I have also copy of Letters Patent issued in the High Court of Admiralty of England, dated the 27th October, 1878, appointing Hon. Henry Black, Commissary or Judge of the Vice-Admiralty Court in the Province of Lower Canada. The jurisdiction is in substance the same as that given to Governor Murray; there was but one Province of Quebec; but afterwards in 1791, the Province of Quebec was divided under the Imperial Act, 31 Geo. III. cap. 31, into Upper and Lower Canada. Hence Letters Patent

issued to Mr. Justice Black and directed to him as "Our Commissary in our Vice-Admiralty Court in Lower Canada."

The Imperial Act 26 Vict., cap. 24, was passed 8th June, 1863. It is entitled:

"An Act to facilitate the appointments "of Vice-Admirals and of officers in Vice-"Admiralty Courts in Her Majesty's pos-"sessions abroad, and to confirm the past "proceedings to extend the jurisdiction and "to amend the practice of those Courts." The Act is intituled, "The Vice-Admiralty Courts Acts, 1863." The second Section contains the Interpretation Clauses in regard to ships or vessels—"'Ships' "shall include every description of ves-"sel *used in navigation, not propelled by* "*oars only*, whether British or Foreign." This Imperial Act in a great measure must govern the rights and remedies contemplated by our "Maritime Jurisdiction Act, 1877."

Whether the *Nithsdale* is a vessel within the meaning of the Dominion Act or the Imperial Act, it may not be out of place to inquire the kind of vessels recognised by Maritime Law as coming within Admiralty Jurisdiction. "Ship" is a general term and, in law, is equivalent to "vessel." It is defined "*a locomotive machine adapted to transportation*" on and over rivers, seas and oceans.

It has been remarked by Benedict, that whether the old tradition that the first idea of the canoe was suggested by the split reed floating on the water, be true, or whether the simple raft was not the first instrument of maritime locomotion and transportation, it is not necessary to enquire; or whether the tiny sail of the Nautilus or the web foot of the water fowl suggested the first means of propulsion. It is, however, certain that ships and vessels in all their variety of construction, and all their modes of propulsion, are but the more or less perfect combinations of the canoe or raft, the sail and the paddle, as human ingenuity and science, in the progress of civilisation and art have removed difficulties and suggested new expedients, till vessels are the most perfect and wonderful productions of human art.

Questions have arisen how far size, capacity, shape and purpose, and mode of propulsion must enter into the definition of a ship or vessel under the Maritime Law. Each nation has its own mode of construction, rigging and navigation, and its peculiar kind of craft; but all are ships or vessels, which are manned by a master and crew, and are devoted to the purposes of transportation and commerce. It is not the form or the construction or the mode of propulsion that establishes the jurisdiction, but the business, purpose and capacity of the craft as an instrument of naval transportation and locomotion on and over rivers, lakes, canals, seas and oceans. Such is a general idea of the kind of craft recognized by maritime law generally. They must have instruments or craft adapted to naval transportation or navigation; but, in the present case, the question seems to be narrowed to the definition of a ship or vessel used in navigation as explained in the interpretation clause of "The Vice-Admiralty Court Act of 1863." In the General Rules formed for the Court of Passage for the borough of Liverpool under the Imperial Act 31 & 32 Vict. cap 71, known as the "County Courts Admiralty Jurisdiction Act, 1868," I find in the interpretation clause the following definition of a vessel: "Vessel shall include every description of a vessel *used in navigation*," so that vessels within the jurisdiction of the Maritime Court must be adapted to the purposes of navigation and transportation. Is the dredge *Nithsdale* one of this description? The original meaning attached to the word dredge, I believe to be a net or drag for taking oysters: it is now called a machine for cleansing canals and rivers. To dredge is to gather or take with a dredge—to remove sand, mud and filth from the beds of rivers, harbours and canals with a dredging machine. What is here called "dredge" is sometimes called "dredger," which Worcester calls "a sort of open barge used in removing sand, mud, silt, etc., from the beds of harbours, rivers and canals—a dredging machine." In Wright's Dictionary the word "dredger" is used instead of "dredge," and defined to be a sort of open barge for removing sand, silt, mud, or the like, from the beds of rivers, docks and harbours.

My attention was directed to the case of *Everard* v. *Kendall*, L. R. 5 C. P. 428, where it was held that collision between two barges in the river Thames was not within the jurisdiction of the Admiralty Law. The definition of a ship or vessel in "the Admiralty Court Act of 1861" is the same as given in the Vice-Admiralty Court above stated. These barges were propelled by oars.

Ex parte Ferguson, L. R., 6 Q. B. 280 was cited, where the English Queen's Bench held that a *fishing coble* employed in the herring fishery, being about 24 feet long, 7 feet beam, 10 tons' burthen, drawing about 18 inches of water, with a main and mizen mast, and a bowsprit to ship and unship and a jib mainsail and mizensail, was a "ship" within the meaning of the Act. Sir Colin Blackburn in giving judgment said: "It is "said the coble cannot be a ship: she is 24 "feet long; she is not entirely decked over "—she has two masts and a rudder which "are removable, and she may be propelled "by four oars; she goes out well to "sea and though the oars are used "to get her out of harbour they "are merely auxiliary to the use of "sails. It is said on behalf of the Board of "Trade, that she is a ship or vessel. The "chief argument against the proposition is "by referring to the interpretation clause "which says 'ship' shall include every de-"scription of vessel *used in navigation* not "propelled by oars. And the argument "against the proposition is one I have "heard very frequently, viz., where an Act "says certain words shall include a certain "thing, that the words must apply exclu-"sively to that which they are to include. "That is not so. The definition given of a "'ship' is in order that 'ship' may have "more extensive meaning. Whether a ship "is propelled by oars or not it is still a ship "unless the words 'not propelled by oars' "exclude all vessels which are ever propel-"led by oars. Most small vessels rig out "something to propel them, and it would be "monstrous to say that they are not ships. "What, then, is the meaning of the word "'ship' in this Act? It is this: that every "vessel that substantially goes to sea is a "'ship.' I do not mean to say that a little "boat going out for a mile or two to sea "would be a ship; but where it is the busi-"ness really and substantially to go to sea, if "it is not propelled by oars, it shall be con-"sidered a ship for the purpose of this Act. "Whenever the vessel does go to sea, "whether it be decked or not, or whether "it goes to sea for the purposes of fishing "or anything else, it would be a ship, you "see. The facts stated are that this vessel, "though of small size, yet goes out 20 or 30 "miles to sea, does go there almost en-"tirely with sails, does stay out many "hours, and I think it is probable that it "goes out for days and nights. This "makes it impossible to say that it is not "*a sea-going vessel*, and consequently a "'ship,' coming within the 'Act,' without "the aid of the interpretation clause."

In *Everard* v. *Kendall*, already cited, it was held by the whole Court that a barge propelled by oars was not a ship or vessel, within the definition above given. Dredges, or dredgers, like the *Nithsdale*, are described sometimes as scows, other times as barges. According to *Everard* v. *Kendall* she would not be a ship or vessel over which the Court of Admiralty had jurisdiction. The *Nithsdale* has no internal powers of propulsion; she is not propelled by oars or sails; she is flat-bottomed; she is intended to be used in harbours, rivers and docks; she has to be moved to a distance by means of a tug; she has not power of her own to be moved; she is not and cannot be a sea or lake-going vessel; she is not adapted to be an instrument of transportation on and over rivers, lakes and canals, or used in navigation or naval transportation. In my opinion the petition must be dismissed; but as the question raised is a new one, of considerable importance, it will be without costs.

LAW SOCIETY.

Trinity Term, 43rd Victoriæ, 1879.

The following is a *resumé* of the proceedings of the Benchers during this Term, published by authority.

August 19th, 1879.

Convocation met.

Special meeting, Aug. 19th, 1879, called on requisition to consider the reception of the Governor-General and Her Royal Highness.

The minutes of last meeting were read and approved.

Mr. Hoskin moved the following, seconded by Mr. Miller,

"That on the occasion of the visit to Toronto of His Excellency the Governor-General and Her Royal Highness the Princess Louise, Osgoode Hall be illuminated, and that the Government of Ontario, as part proprietors of the building, be requested to join in the arrangement. The expenditure on the part of the Law Society, not to exceed the sum of $500 exclusive of gas, and that the matter be entrusted, on the part of the Law Society, to the Finance Committee." —Carried.

Moved by Mr. Crickmore, seconded by Mr. Read and resolved, That it be ascertained on what day it will be convenient for the Governor-General and Her Royal Highness to view the Osgoode Hall, and that the Benchers do attend at the time to be appointed to receive them, and that notice to the Bar be given through the papers, and that the Finance Committee do carry out this resolution.—Carried.

Adjourned.

August 25th, 1879.

The minutes of last meeting were read and approved.

Report of Legal Education Committee on the cases of G. W. Meyer, C. W. Mortimer, J. Maxwell, and J. Folinsbee, was received and read.

Mr. Hodgins moved that the Report be adopted with the following amendment:—"That Mr. Folinsbee's service be allowed on his producing a certificate from Mr. Upper, corroborative of Mr. Folinsbee's declaration of 23rd August.—Carried.

Report of Examiners on Examination of Candidates for call—received and read.—Adopted.

Ordered, That F. E. Hodgins, J. M. Glenn, G. R. Webster, G. Claxton, C. W. Colter, F. W. Crothers, H. T. W. Ellis, C. W. Mortimer, G. T. Blackstock, P. L. Palmer, J. A. Williamson, and Alexander Jackson, whose cases are reported to be regular by the Secretary, be called to the Bar.

Ordered, That the cases of A. J. McColl and D. A. McIntyre be referred to the Committee on Legal Education for report.

The following gentlemen were called:—Messrs. Glenn, Webster, Claxton, Colter, Crothers, Mortimer, and Palmer.

Report of Examiners on examination of Attorneys was received and read.

Ordered, That the following gentlemen, whose cases are reported to be regular by the Secretary, receive Certificates of Fitness:—F. E. Hodgins, J. M. Glenn, M. A. McHugh, J. Maxwell, W. J. Lavery, A. Jackson, N. Mills, W. J. Ferguson, W. Munro, W. A. Donald, C. W. Mortimer, J. McLean, and J. S. McDonald.

Ordered, That the cases of Messrs. Wright, McIntyre, Comfort and Patterson be referred to the Committee on Legal Education for report.

Ordered, That Mr. Folinsbee's certificate be granted on his producing the certificate referred to in the previous resolution on his case.

Messrs. Blackstock and Williamson were called to the Bar.

The Report of Examiners on Intermediate Examinations was received, read, and approved.

The Secretary reports that all those who have passed the first Intermediate Examinations as both Students-at-Law and Articled Clerks, namely:—A. A. Adair, G. W. Meyer, H. B. Dean, C. J. Leonard, A. H. Lefroy, G. Plaxton, A. Howden, T. A. Snider, D. J. Lynch, B. Sparham, J. A. Robinson, J. M. Ashton, O. M. Jones, W. Smaill, J. A. Gilbert, W. R. Thompson, G. R. Knight, W. T. Williams, T. H. Stinson and W. E. Scott, have passed at the proper time.

Ordered, That the Examinations be allowed as Students and Clerks.

The Secretary reports that all those who have passed the First Intermediate Examintion as Students-at-Law only: Namely, T. C. L. Armstrong, C. W. Oliver, F.H.

King, R. M. Flood, and L. E. Dancy, have passed at the proper time.

Ordered, That their Examinations as Students-at-Law be allowed.

The Secretary reports that all those who have passed the Second Intermediate Examination as both Students-at-Law and Articled Clerks: namely, W.D. Swazie, J. Williams, R. E. Reynolds, J. R. Brown, W. J. Porte, Jas. Scott, D. K. Cunningham, A. H. Manning, W. C. Perry, J. L. Darling, R. W. Wilson, A. Ford, A. Olteir, J. Dowlin, C. C. Going and F. F. Harper have passed at the proper time.

Ordered, That their examinations be allowed as Students and Clerks.

The Secretary reports that the gentleman who has passed his Second Intermediate Examination as a Student-at-Law, namely, G. H. Muirhead, has passed at the proper time.

Ordered, That his examination be allowed.

Report of Legal Education Committee on the Primary Examinations received and read.

Ordered, That the following graduates, namely:

John Young Cruickshank, B. A., Victoria College.

Thomas Arthur Elliott, B.A., Queen's College.

John Campbell Ferrie Brown, B.A., University of Toronto.

Richard Scougall Cassels, B.A., University of Toronto.

John Walter Delaney, B.A., University of Toronto.

Frederick William Aplin Gordon Haultain, B.A., University of Toronto.

Charles Coursolles McCaul, B.A., University of Toronto.

John D. Cameron, B.A., University of Toronto.

Thos. P. Corcoran, B.A., University of Toronto.

John Carruthers, B.A., University of Toronto.

James Chisholm, B.A., University of Toronto.

Ghent Davis, B.A., University of Toronto.

Joseph A. Culham, B.A., University of Toronto, and the following Matriculants of Universities, namely:

John Franklin Palmer, University of Toronto.

James D. S. C. Robertson, University of Toronto.

William. S. Servos, University of Toronto, whose cases are favourably reported on by the Committee, be entered on the books as Students-at-Law.

Ordered, That Mr. E. J. Clarke, whose case was favourably reported on by the Committee, be allowed his examination as an Articled Clerk.

Ordered, That the report of the Committee as to the case of Mr. Haultain be adopted, and that on compliance therewith he be entered on the books as a Student-at-Law.

The petition of Hubert L. Ebbels, for call as an attorney of 10 years' standing was received and read.

Ordered, That it be referred to a special Committee, consisting of Mr. Crickmore, Mr. Smith and Mr. Crombie.

Adjourned.

August 26th, 1879.

Minutes of last meeting were read and approved.

The report of Committee on Legal Education, on cases of D. A. McIntyre and A. J. McColl, for call, received and read.

Ordered, That Messrs. McColl and McIntyre be called.

Report of Committee on Legal Education, on cases of Messrs. McIntyre, Wright, Comfort and Patterson, for admission received, read and adopted.

Ordered, That Messrs. McIntyre, Wright, Comfort and Patterson do receive their certificates of fitness.

The report of Special Committee, on case of Mr. Ebbels, was received and read.

Ordered, To be considered forthwith and adopted.

Ordered, That Mr. Ebbels be called on payment of the usual fees in special cases.

Messrs. H. L. Ebbels, A. Jackson, D. A. McIntyre were called to the Bar.

The letter of Mr. Ince, as to his fees and fines was read.

Mr. Crickmore moved that Mr. Ince be

relieved from payment of fines, on condition of immediate payment of all arrears of fees.

Mr. Hodgins moved in amendment, that the matter be referred to the Finance Committee with power to act.

The amendment was carried.

The balance sheet for the quarter ending 30th June was presented by the Secretary and read.

Mr. Hodgins moved that the usual notice be given for applications for the office of Examiner in Equity and Real Property, which becomes vacant on the 1st of October next, and that notice be given to each Bencher that the appointment will be made on the last Friday of Term.—Carried.

Adjourned.

August 30th, 1879.

Minutes of last meeting were read and approved.

The report of the Legal Education Committee, on case of Mr. Phippen, was received, read and ordered for immediate consideration.

Ordered, that the examination of Mr. Phippen, as an Articled Clerk be allowed.

Mr. Hodgins moved that the Attorney-General and Mr. Crooks, be associated with the Finance Committee on the reference as to the reception of the Governor-General and Her Royal Highness.—Carried.

Mr. F. E. Hodgins was called to the Bar.

Mr. Crombie moved that the Judges of the Superior Courts be invited to attend on the occasion of the expected visit of His Excellency and Her Royal Highness, and that two tickets for the ladies of his family be issued to each Judge and Bencher, and that the Bar be notified through the newspapers, that they are expected to appear in their robes, and that each Barrister can receive his ticket of admission on application to the Secretary, at any time up to the day before the day fixed for the reception.—Carried.

Convocation Room, Osgoode Hall,
5th September, 1879.

Present, Mr. Thomas Hodgins. This day being the last Friday of Trinity Term, and one of the standing Convocation days, and there being no quorum of Benchers up to the hour of eleven o'clock in the forenoon, the undersigned Bencher, being the only Barrister present, hereby adjourns the meeting of Convocation from this day until to-morrow, Saturday, the sixth day of September, A.D. 1879, to be then holden at the hour of half-past ten in the forenoon.

(Signed) Thomas Hodgins.

September 6th, 1879.

Minutes of August 30th read and approved.

Minutes of 5th September read and approved.

Report of Legal Education Committee respecting Robert Miller's case presented, received, and read.

Ordered for immediate consideration and adopted.

Mr. McColl and Mr. Ellis were called to the Bar.

Report of Legal Education Committee on applications for office of Examiner in Equity and Real Property, received and read.

Ordered for immediate consideration.

Mr. Crickmore moved in amendment as follows:—"That the appointment of an Examiner for call and certificate of fitness in Real Property and Equity be not now proceeded with, and that the consideration of the office of Examiners and the manner of their appointment and salary be postponed till next Michaelmas Term, and that the Committee on Legal Education be directed to frame and report by the first day of next Term, a rule or rules as to examiners and examinations, and as to the manner and term of appointment of the examiners."—Carried.

The Report of the Committee on Legal Education as to the case of H. J. Campbell, was received and read.

Ordered, That Mr. Campbell be entered on the books as a Student-at-Law.

The Report of the Committee on Journals of Convocation was received and read.

The Report of the Committee on Reporting was received and read.

Ordered, To be considered forthwith and adopted.

Letter of Mr. W. R. Mulock as to case of Mr. Dunning, referred to Finance Committee with power to act.

A draft of an address to His Excellency and Her Royal Highness, on the occasion of their visit, was read and adopted.

Ordered, That on the occasion of the reception each Barrister and Officer of the Courts in Osgoode Hall, who applies, be supplied with tickets for himself and one lady.

Adjourned.

FLOTSAM AND JETSAM.

The idea of the representation of minorities is this: that if you have got one thousand electors to elect ten representatives, any hundred of the thousand might combine together to vote for one of the ten, and if they combined you might get the whole thousand electors represented in your ten, each hundred getting a representative. So throughout the whole kingdom the forces might be so distributed that each group will be collected together, and vote for a particular man, sending him to represent them. If that could be realized you would secure the first object of the representative principle: you would get the representation of the whole. The elected body would have the flexibility and the life of the elective body. It would be the electing body itself in miniature. As the people in the country would combine, so the elected representatives would combine, representing every determination of the original body. You have, therefore, under this principle of the representation of minorities, an assured result—namely, the security that in the body elected there will be an accurate reflection of the persons who elected them.—*Nineteenth Century*, July, 1879.

A contributor from the Forest City has sent us what he calls "a sort of rough blazed line through the sylvan shades of the Revised Assessment Act." Like Milton, our legal poet has essayed to sing of "things unattempted yet in ....rhyme," and far be it from us to rob him of immortality, if our columns can grant the boon.

TAX SALES—INSTRUCTIONS TO SEARCH.

First look in the *books of the Treasurer;*
See for what years, as entered there,
The land was sold—for first year see
If land in *Assessment Roll* shall be;
If not there found, why, sharply note
The N. R. Roll, and see if aught
Of wrong description can be found,
And if certificate's safe and sound.
Collector's Roll for self same year
Pray search with care, and see if there
Remarks in the margin do appear
To show why taxes in arrear.
See if a *list to Treasurer* came,
As section 90 doth proclaim.
In the year of sale 'tis best to know
If *three-year list* to clerk did go
Before the first of Febru-*ree*,
And if the Assessor carefully
Has marked the lot, or close beside,
With the fatal words, "not occupied,"
And then made list correct—complete—
By attaching his signed certificate.
Likewise, 'tis best to be discerned
What list to Treasurer was returned,
Or if the Treasurer has had
Remitting by-law, good or bad.
With view of *warrant* don't dispense,
And see if signed and sealed, and glance
At lot's description, if 'tis said
The land was ever patented.
I pray thee now let it be seen
If the lot hath advertised been
For thirteen weeks in a county sheet,
For four in the reg'lar *O. Gazette;*
And did *advert's'ment* clearly state
Land would be sold at place and date
When ninety days and also one
From publication first are done?
If sale adjourned, did Treasurer state
At [a week elapsed] another date,
In local paper—stating when—
And sell for costs and taxes then?
See no "official" bought the lot,
That mortgagee acquired it not—
That taxes 'fore the sale not paid,
And a sale for all arrears was had.
Inspect *certificate of sale:*
The interest sold it should not fail
To show—nor part nor quantity,
And that a deed, at th'expiry
Of a year, to the buyer will be signed,
And a state of costs should be conjoined.
If land were not *redeemed*, a *deed*
The purchaser will surely need.
And now, "ahem," I humbly pray,
Compare said deed with schedule K.

Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 42nd VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

Thomas Stinson Jarvis.
Thomas Taylor Rolph.
Louis Adolphe Olivier.
Malcolm Græme Cameron.
George Edgar Millar.
Nicholas Dubois Beck.
Walter J. Breakenridge Read.
Emerson Coatsworth, Jr.
John Morrow.
James Carman Ross.
Alphonse Basil Klein.
Edward George Ponton.

The names are given in the order in which they appear on the Roll, and not in the order of merit.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

John Dickinson, B.A.
John McLaurin, B.A.
Antoine P. E. Panet, B.L.

Matriculants.

Charles Reginald Atkinson.
John McCullough.
George William Ross.

Articled Clerks as of Hilary Term.

William Barr.
Edward Utton Sayers.
John Angus McDougal.
James A. Scott.
William Grayson.
John Lawson.
Francis Henry Butler.

Articled Clerk as of Easter Term.

Andrew Joseph Clark.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

Mathematics.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical analysis of a selected poem :—
1879.—Paradise Lost, Bb. I. and II.
1880.—Elegy in a Country Churchyard and The Traveller.
1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.
Translation from English into French Prose—
1878 and 1880 } Souvestre, Un philosophe sous les toits.
1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.
Mussaeus, Stumme Liebe.
1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.
1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR NOVEMBER.

1. Sat. ..Chief Justice Harrison died, 1878.
2. Sun. ..21st Sunday after Trinity.
3. Mon....Chief Justice Draper died, 1877.
4. Tues...Primary examinations.
5. Wed...Primary examinations. Sir J. Colborne Lieutenant-Governor, 1828.
6. Thur..Primary examinations.
9. Sun. ..22nd Sunday after Trinity. Prince of Wales born, 1841.
11. Tues...Court of Appeal sits. 1st Intermediate examination.
12. Wed...2nd Intermediate examination.
13. Thur..Attorneys' examination.
14. Frid....Examination for call.
16. Sun. ..23rd Sunday after Trinity. A. Wilson sworn in Judge, Q.B., 1868. J. W. Gwynne, sworn in Judge, C.P., 1868.
17. Mon. ..Michaelmas Term begins. Convocation meets.
18. Tues...Convocation meets. Hagarty, C.J., C.P., sworn in C. J. of Q.B. Wilson, J., sworn in C.J. of C.P., 1878.
22. Sat. ..Convocation meets.
23. Sun. ..24th Sunday after Trinity.
25. Tues...Lord Lorne, Gov.-Gen., 1878.
27. Thur..Scholarship examinations. M. C. Cameron sworn in Judge, Q.B., 1878.
30. Sun. ..1st Sunday in Advent. St. Andrew's Day Moss, J., appointed C.J. of Appeal, 1877.

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LAW SOCIETY OF UPPER CANADA. .....

Canada Law Journal.

Toronto, November, 1879.

Sir Anthony Cleasby, late Baron of the Exchequer Division in England, died last month in his seventy-fifth year. He took high honours at Cambridge, having been third wrangler and first class man in classics. After his call to the Bar in 1828, he joined the Northern Circuit, and had a large practice. In 1868 he was made a judge, which position he occupied until his resignation last January.

The London *Times*, in a recent issue, calls attention to the case of *Weir* v. *Preedy*, which was argued recently in one of the English County Courts, and which it justly remarks involved questions of considerable importance as between landlords and tenants. The facts were as follows:—By an agreement, dated in 1876, the plaintiff let to the defendant a house in the Lambeth Road for three years, and the defendant thereby covenanted "to keep the premises in good and sufficient repair during the tenancy." The house was an old house, and the roof was in a leaky state at the date of the agreement and until March of the present year. The plaintiff having refused to repair it, the defendant, by tarring it and otherwise, partially stopped the leakage, and prevented any damage to the house. It, however, turned out that the rafters in the roof were completely decayed and had sunk, and in March, 1879, the plaintiff, on a requisition from his superior landlord, without any communication with the defendant, put new rafters to the roof, and, in fact, completely renovated it, and also effected certain other improvements, at a cost altogether of £33, which sum he sought to recover from the defendant. It appeared,

however, that the cost of repairing the roof alone would not have exceeded £10, and the plaintiff eventually limited his claim to that amount. His Honour, relying on the case of *Williams* v. *Williams*, L. R. 9 C. P. 639, decided that, even assuming that there had been a breach of covenant, the plaintiff could only recover nominal damages, because, in consequence of the repairs having been executed, although by the plaintiff himself, there was at the time when the action was brought no longer any injury to the reversion, which is the measure of damages in such cases. And on the remaining question, viz., as to whether or not there had been any breach of the defendant's covenants, His Honour decided there had not, and in support of his decision cited the case of *Gutteridge* v. *Mayard*, 7 C. & P., 129, in which Lord Chief-Justice Tindal held that "when an old house is demised with a covenant to repair it is not meant that the house is to be restored in an improved state, or that the consequences of the elements should be averted, but the tenant has only the duty of keeping the house in the same state in which it was at the time of the demise." The verdict was entered for the defendant with costs.

PROFESSIONAL ETHICS.

We have been requested, by a letter which appears in another place, to give our opinion upon a question of considerable importance to the profession. It appears that a Mr. Hutchison was, for some time, the solicitor of the London Loan Company of Canada, receiving fees for his services in the usual way. The Company, subsequently, determined to make a change in the mode of remunerating their solicitor, and passed a resolution to the effect that he should thenceforth be paid by salary in lieu of fees; that the salary should be his remuneration in full for all services including conveyancing, including defective titles, collections and other suits, etc.; and that the fees chargeable for such services should be received *by the Company for its own use*. Mr. Hutchison, on being notified of this change, stated that he could be no party to such an arrangement, and Mr. McNab, another solicitor, residing in the same city, was appointed in his place, the latter accepting the position on the terms proposed.

Mr. Hutchison's reasons for refusing these terms were, as appears from a printed circular addressed by him to the shareholders, because he considered the arrangement "illegal and unprofessional, and, at the same time, detrimental to the interests of the Company." As to the latter proposition, neither we nor our readers are particularly concerned. If, however, the former be correct, namely, that the bargain is illegal, it is quite possible that many shareholders may decline to risk their money in a company managed by directors who do illegal acts with their eyes open. This, however, is for them to consider and not for us to enlarge upon.

If a legal journal, which assumes to be the mouthpiece of an honourable profession, has one duty more than another to perform, it is to take notice of matters affecting the standing of its members, and we have not failed, when circumstances required it, fearlessly to state our conviction, and we now feel called upon to do so in the case presented to us.

We regret that this matter necessarily assumes the form of an enquiry, not so much as to whether Mr. Hutchison could honourably have done otherwise than he did, but whether the solicitor, who accepted the position refused by the former, acted illegally or unprofessionally in so doing. If he has so acted, Mr.

Hutchison will at least have the satisfaction of knowing that he has made, though to his own detriment, a protest in favour of the honour and independence of his profession, which deserves the thanks of his brethren.

It is fortunately not necessary in this case for us to do more than to turn to our own reports to satisfy ourselves as to the legality or illegality of the alleged arrangement, for we find that the question has already been pronounced upon, incidentally it is true, but in unmistakable language, by no less an authority than the late Chief Justice Draper, whose dictum on such a matter is quite sufficient, we should suppose, to settle any possible doubt on the subject. In *Jarvis v. The Great Western R. W. Co.*, 8 C. P., it was held that as the costs of a suit are in all cases the money of the client, an attorney who receives from his client an annual salary in lieu of costs, is not entitled to tax, as against the other party to the suit, more than such items as he is entitled to tax against his client under his arrangement with the latter, which, in this case were disbursements only. The remarks in the judgment referred to, which are applicable to the question before us, are as follows : (Draper C. J., delivering the judgment of the Court) "If this case had depended merely on the question which was advanced and relied on when I granted the summons originally, viz., whether under the circumstances the defendants (the Company with whom the arrangement as to salary was made) were seeking unlawfully to realize a profit by the services of their attorney, I should have no difficulty in saying that the rule should be discharged." And again : "If what was suggested when the summons was originally moved, namely, that the defendants sought unlawfully to realize a profit out of the professional services of their attorney were true, I suppose the taxation would be prevented; for it would, in principle, amount to allowing suits to be carried on in the name of an attorney for the profit of an uncertificated person."

In that case "it was unequivocally asserted that though, as between the defendants and their attorney, he had been paid for these services, yet the costs which the plaintiff was liable to pay did not belong to the defendants." But in the case now drawn to our attention, the very vice that the Chief Justice speaks of, namely, the client making a profit out of the professional services of the attorney, is the very essence of the arrangement.

This high authority, therefore, pronounces such a bargain to be unlawful, or in other words, illegal, and if illegal, it must of course be unprofessional on the part of any professional man who is a party to it.

The conclusion would seem, therefore, to be obvious, that Mr. Hutchison took the only course open to him by declining to accept the proposed terms. We regret that another solicitor should have thought proper to accede to them. We trust the latter will, upon further consideration, see the matter in the same light as must, we believe, the great majority of those whose opinion is worth having.

THE LETELLIER DESPATCH.

We print below in full this important constitutional document, which will, probably, be known to posterity by the above title. Viewing it, not as a party men, but merely as loyal and patriotic Canadians, it is impossible to regard it with altogether unmixed feelings. Whether or not the Governor-General acted in strict accordance with constitutional usage in referring the matter to Downing Street, or

whether the manner of so doing was judicious, or whether it would not have been well if he had made himself familiar with the subject before coming to this country, knowing that the question had already been raised—one thing is certain, that it was very desirable that so grave a precedent should not have been established without full consideration, and upon the advice of the Home Government.

The *Times*, in a thoughtful and impartial leading article on the subject, calls attention to some grave considerations. It is, of course, written from an Imperial point of view, and from that point of view it must be judged. The writer remarks that the Governor in every Colony is looked upon as something more than the passive exponent of the views of its Parliamentary Ministers. He is accepted as the delegate of the Sovereign, as the confidential emissary of the Home Government, to which, as well as to the Colonial Government, he owes a responsibility; but "the moral that Colonial Governors will draw from the despatch is that of unconditional obedience, while a hundred signs warn us of the necessity of directing the attention of Colonial Governors to the times and circumstances when they should resist the counsels of their ordinary advisers."

The *Times* maintains that Lord Lorne was right in his reading of the Dominion Act, and that the plain meaning is that while a Governor-General appointed a Lieutenant-Governor, on the advice of his Ministers, the removal of such a subordinate lay within his personal responsibility. "The Viceroy was intended to be a screen sheltering Provincial Governments and Governors, from being continually affected by the political vicissitudes of the central Government. Henceforth, however, the Dominion Act must be read as if a Lieutenant-Governor must be removed as he is appointed by the Governor-General in Council." The *Times* especially censures Sir Michael Hicks-Beach, for not suggesting to Lord Lorne the prudence of testing the electors on the issues raised.

For ourselves, our task is not to express either praise or blame in any quarter, but simply to point out the constitutional importance of the despatch. Yet the words of Mr. Baden Powell, in a recent article on Reform in Victoria, in the *Fortnightly Review* for June last, occur to our minds:

"The great material good of a continued citizenship in a British Empire, is held to be that its component parts will thereby be enabled to steer clear of the rocks and shoals of a too energetic, too full-blooded political life, on which have been ship-wrecked the States of South America, as were those of Mediæval Italy and Ancient Greece. Our colonies are young as yet in political life, and no doubt the substantial and assured progress of the British Colony, as compared with that of any other nation—no doubt the fact that British Colonies have never afforded an instance of civil or intercolonial war—is largely, if not entirely due to the circumstance, that the energetic first flush of political life called out by the inauguration of self-government in new and young communities, is advised and controlled by means of the Governor, the Colonial office, and in the last instance, appeal to the Imperial Parliament, that is, by all the legislative and administrative experiences of the very home of Parliamentary Government."

The following is the despatch addressed to Lord Lorne:—

"Downing-street, July 3rd, 1879.

"My Lord,—Her Majesty's Government have given their attentive consideration to your request, for their instructions with reference to the recommendation made by your Ministers, that Mr. Letellier, the Lieutenant-Governor of Quebec should be removed from his office. It will not have escaped your observation, in making this request, that the constitutional question to

which it relates is one affecting the internal affairs of the Dominion, and belongs to a class of subjects with which the Government and Parliament of Canada are fully competent to deal. I notice with satisfaction that, owing to the ability and patience with which the new Constitution has been made by the Canadian people to fulfil the objects with which it was framed, it has very rarely been found necessary to resort to the Imperial authority for assistance in any of those complications which might have been expected to arise during the first years of the Dominion; and I need not point out to you that such reference should only be made in circumstances of a very exceptional nature. I readily admit, however, that the principles involved in the particular case now before me are of more than ordinary importance. The true effect and intent of those sections of the British North America Act, 1867, which apply to it have been much discussed, and as this is the first case which has occurred under those sections, there is no precedent for your guidance. For this reason, though regretting that any cause should have arisen for the reference now made to them, Her Majesty's Government approve the course which you have taken, on the responsibility and with the consent of your Ministers, and I will now proceed to convey to you the views which they have formed on the question submitted for their consideration. The several circumstances affecting the particular case of Mr. Letellier have been fully stated in Sir J. A. Macdonald's memorandum of April 14, in Lieutenant-Governor Letellier's letter of April 18, and in communications which I have since received from Mr. Langevin, who, accompanied by Mr. Abbot, has come to this country for the purpose of supporting the advice given by the Government of which he is a member, and from Mr. Joly, who was similarly empowered to offer any explanations that might be required on the part of Mr. Letellier. If it had been the duty of Her Majesty's Government to decide whether Mr. Letellier ought or ought not to be removed, the reasons in favour of and against his removal would, I am confident, have been very ably and thoroughly put before them by Messrs Langevin and Abbot, and by Mr. Joly. I have not, however, had occasion to call for any arguments from either side on the merits of Mr. Letellier's case. The law does not empower Her Majesty's Government to decide it, and they do not therefore propose to express any opinion with regard to it. You are aware that the powers given by the British North America Act, 1867, with respect to the removal of a Lieutenant-Governor from office, are vested, not in Her Majesty's Government, but in the Governor-General; and I understand that it is merely in view of the important precedent which you consider may be established by your action in this instance, and the doubts which you entertain as to the meaning of the statute, that you have asked for an authoritative expression of the opinion of Her Majesty's Government on the abstract question of the responsibilities and functions of the Governor-General, in relation to the Lieutenant-Governor of a Province under the British North America Act, 1867. The main principles determining the position of the Lieutenant-Governor of a Province, in the matter now under consideration are plain. There can be no doubt that he has an unquestionable constitutional right to dismiss his Provincial Ministers, if from any cause he feels it incumbent upon him to do so. In the exercise of this right, as of any other of his functions, he should, of course, maintain the impartiality towards rival political parties which is essential to the proper performance of the duties of his office; and for any action he may take, he is, under the 59th section of the Act, directly responsible to the Governor-General. This brings me at once to the point with which alone I have now to deal—namely, whether in deciding, whether the conduct of a Lieutenant-Governor merits removal from office, it would be right and sufficient for the Governor-General, as in any ordinary matter of administration, simply to follow the advice of his Ministers, or whether he is placed by the special provisions of the statute under an obligation to act upon his own individual judgment. With reference to this question it has been noticed that while under section

58 of the Act, the appointment of the Lieutenant-Governor is to be made 'by the Governor-General in Council, by instrument under the Great Seal of Canada,' section 59 provides that 'a Lieutenant-Governor shall hold office during the pleasure of the Governor-General:' and much stress has been laid upon the supposed intention of the Legislature, in thus varying the language of these sections. But it must be remembered that other powers vested in a similar way by the statute in the Governor-General were clearly intended to be, and in practice are, exercised by and with the advice of his Ministers; and though the position of a Governor-General would entitle his views on such a subject as that now under consideration to peculiar weight, yet Her Majesty's Government do not find anything in the circumstances which would justify him in departing in this instance from the general rule, and declining to follow the decided and sustained opinion of his Ministers, who are responsible for the peace and good government of the whole Dominion to the Parliament to which, according to the 59th section of the statute, the cause assigned for the removal of a Lieutenant-Governor must be communicated. Her Majesty's Government therefore can only desire you to request your Ministers again to consider the action to be taken in the case of Mr. Letellier. It will be proper that you should, in the first instance, invite them to inform you whether the views, as expressed in Sir J. A. Macdonald's memorandum, are in any way modified after perusal of this despatch, and after examination of the circumstances now existing, which since the date of that memorandum may have so materially changed as to make it in their opinion no longer necessarily for the advantage, good government, or contentment of the Province that so serious a step should be taken as the removal of a Lieutenant-Governor from office. It will, I am confident be clearly borne in mind that it was the spirit and intention of the British North America Act, 1867, that the tenure of the high office of Lieutenant-Governor should, as a rule, endure for the term of years specially mentioned, and that not only should the power of removal never be exercised, except for grave cause, but that the fact that the political opinion of a Lieutenant-Governor had not been, during his former career, in accordance with those held by any Dominion Ministry, who might happen to succeed to power during his term of office, would afford no reason for its exercise. The political antecedents and present position of nearly all the Lieutenant-Governors now holding office, prove that the correctness of this view has been hitherto recognised in practice; and I cannot doubt that your advisers, from the opinions they have expressed, would be equally ready with the late Government to appreciate the objections to any action which might tend to weaken its influence in the future. I have directed your attention particularly to this point, because it appears to me to be important that, in considering a case which may be referred to hereafter as a precedent, the true constitutional position of a Lieutenant-Governor should be defined. The whole subject may, I am satisfied, now be once more reviewed with advantage, and I cannot but think that the interval which has elapsed (and which has from various causes been unavoidable) may have been useful in affording means for a thorough comprehension of a very complicated question, and in allowing time for the strong feelings on both sides, which, I regret to observe, have been often too bitterly expressed, to subside.

"I have, &c.,

"M. E. Hicks-Beach.

"The Right Hon. the Marquis of Lorne."

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

CHANCERY.

Proudfoot, V. C.] [June 10.

London Can. L. & A. Co. v. Palford.

Trade fixtures as between mortgagor and mortgagee—Subsequent incumbrancers—Proper parties in Master's office.

Certain machinery was placed in a factory

on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor (the defendant) had no interest in any of the machinery at the date of the mortgage to the plaintiffs, having previously sold out to one Abel; but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to the Parry Sound Lumber Company. On the reference under decree obtained by plaintiffs, the Master made the Lumber Company parties as subsequent encumbrancer.

Held (assuming the machinery or some portion of it to be trade fixtures, removable as between landlord and tenant), that the machinery (or such portion aforesaid) when acquired by the mortgagor, would go to increase the plaintiffs security, and that therefore the Master was right in making the Lumber Company parties as subsequent encumbrancers.

Further, that there appeared no good reason why the plaintiffs, having purchased and taken an assignment of a mortgage made by defendant in 1869, were not entitled, under that, to have the greater part, if not all the machinery added to their security.

Proudfoot, V.C.] [June 10.

Fisken v. Ince et al.

Revivor order—Discharge of—Practice.

An order of revivor was obtained in the cause on the ground that the plaintiff had assigned all his interest, &c., to one Close.

The plaintiff applied to the Court by petition to set aside the order, disputing the assignment on the allegation of which the order was obtained.

Proudfoot, V. C., discharged the order of revivor with costs.

Campbell v. The Northern Railway Co.

V. C. Blake.] [Sept. 31.

Power of Railways to arrange with each other — Competing lines.

The Railway Act of 1868 enacts that "The directors of any railway company may at any time make agreements or arrangements with any other company, either in Canada or elsewhere, for the regulation or interchange of traffic to or from their railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and apportionment of tolls, rates, and charges in respect of such traffic, and generally in relation to the management and working of the railways or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding twenty-one years, and to provide either by proxy or otherwise for the appointment of a committee or committees for the better carrying into effect any such agreement or arrangement, with such powers and functions as may be necessary or expedient, subject to the consent of two-thirds of the stockholders voting in person or by proxy;" the word "traffic" being interpreted by the Act as meaning "not only passengers and their baggage, goods, animals, and things conveyed by railways, but also cars, trucks, and vehicles of any description adapted for running over any railway."

Held, That the powers of a Railway Company to make such arrangements were not controlled by a subsequent Act, which conferred similar powers with others, and "provided also that the powers hereby granted shall not extend to the right of making such agreements with respect to any competing lines of railways," although one of the termini of both roads was the same, it being shown that the arrangement entered into was for the mutual advantage of both companies.

M'Neil v. The Reliance Mutual Fire Insurance Company.

V. C. Blake.] [Oct. 6.

Insolvent Act—Insolvent Company—Jurisdiction—Demurrer.

The object of the Legislature in creating the Insolvent Court is for the purpose of administering the estates of insolvents, and this Court will not, unless in a very exceptional case, interfere with the jurisdiction thus created. Therefore, where a bill was filed for the purpose of winding-up the affairs of an insolvent Insurance Com-

a demurrer thereto for want of equity was allowed, although the bill prayed, amongst other things, for the appointment of a receiver to get in the assets and wind up the affairs of the company.

QUEEN'S BENCH.

Osler, J.] [Oct. 10.

In Re Sarnia and Point Edward.

Separation of municipalities—Liability for Government drainage—Arbitration—Practice.

Held, that in the case of the separation of part of a township from the main municipality, and its erection into an independent village, the assessment in respect of government drainage is not a matter to be arbitrated upon between the two corporations under the Municipal Act, as being a debt of the township to which the village ought to contribute, the liability of each corporation for its own proportion being fixed by the Ontario Drainage Act.

Semble, that the papers upon which the rule *nisi* (which was to refer back the award for reconsideration) was granted not being verified, and there being no affidavit as to the facts, would have been a fatal objection to the application.

eld, also, that the by-laws of the municipalities appointing the arbitrators or copies thereof, and the appointment of an additional arbitrator should also have been filed.

Bethune, Q. C., for applicants.

J. K. Kerr, Q.C., contra.

COMMON LAW CHAMBERS.

Lock v. Todd.

Mr. Dalton.] [June 13.

Notice to reply—Order for time to reply—Waiver.

The obtaining of an order for time to reply waives an objection that no notice to reply was served, and takes the place of such notice.

Flake v. Clapp.

Mr. Dalton.] [June 20.

Juror—Withdrawal of—Determination of cause.

The withdrawal of a juror at the trial has the effect of concluding the suit, and, with it, of determining the whole cause of action.

Davidson v. Cameron.

Mr. Dalton.] [June 20.

Foreign judgment—Liquidated amount—Costs.

The plaintiff sued the defendant on a foreign judgment for $240, and specially endorsed this amount upon the writ of summons. He obtained judgment in default of appearance.

Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of Revised Statutes, Ontario, chap. 50, sec. 153, and that the plaintiff was entitled to Superior Court costs.

Trust and Loan Company v. Jones.

Mr. Dalton.] [Aug. 27.

Ejectment—Service—Signing judgment.

The writ in ejectment was served upon the defendant's wife after he had left the country.

An order to sign judgment against the husband was granted in default of appearance.

Taylor v. Adam.

Mr. Dalton.] [Sept. 2.

Pleading—Trover—Uncertainty.

The plaintiff alleged in one count in trover that the defendant converted to his own use *or*, wrongfully deprived the plaintiff, &c.

Held, over-ruling *Bain* v. *Mackay*, 5 Practice Reports, 471, that the count is not embarrassing.

Doyle v. The Owen Sound Printing Company.

Mr. Dalton.] [Sept. 11.

Pleading—Libel—Apology—Payment into Court.

In an action for libel the plea of *not guilty* was held inconsistent with a plea of apology and payment into Court, and was ordered to be struck out.

Mr. Dalton.] [Sept. 13.

Anglo-Canadian Mortgage Co. v. Cotter.

Ejectment—Disclaimer—Possession—Defendants—Striking out.

An application by defendants in an action of ejectment to have their names struck out on the ground that they were not in possession at or subsequent to the issue of the writ, and disclaim any interest in the land, is regularly made before appearance, although the application would be entertained after appearance, should the justice of the case require it. But as the defendants applied after appearance to have their names struck out, and the Court, from the facts, entertained a doubt as to the good faith of these defendants, the application was dismissed with costs.

Mr. Dalton.] [Sept. 17.

Gannon v. Gibb.

Arbitration—Reference—Facts in dispute.

Held, on an application to refer to arbitration, that where a material question of fact was in dispute, the case was not a proper one in which to make an order for compulsory reference.

Osler, J.] [Oct. 8.

King v. Farrell.

Prohibition—Division Court—Cheque—Jurisdiction.

The defendant who resided within the the limits of the Tenth Division Court of York, drew a cheque in the plaintiff's favour, within the limits of the First Division Court of the same County, upon a bank in the Division in which defendant resided. The cheque being dishonoured, the plaintiff sued upon it in the First Division Court.

Held, that the action was improperly brought in the First Division Court, and that a summons for a prohibition thereto on the ground of want of jurisdiction must be made absolute.

Osler, J.] [Oct. 14.

Merchants' Bank v. Pierson.

Examination of party—Contempt.

The defendant having obtained the usual order to examine the manager of a branch of the plaintiffs' Bank, the order was served upon the manager with a notice to produce books, &c., in accordance with R. S. O., cap. 50, sec. 161. At this examination the manager refused to produce the books, and a summons was obtained to commit him for contempt.

Held, that the application to commit could not be entertained in chambers, but should be made before the Court.

MASTER'S OFFICE.

The Master.] [May 15.

Trust and Loan Company v. Gallagher.

Discharge of mortgage—Effect of before registry.

The plaintiffs, the Trust and Loan Company, advanced $2,000 on certain land, on condition that three encumbrances against it should be discharged out of the proceeds of their loan and otherwise. The first and third encumbrancers were paid off, and the former executed a statutory discharge of their mortgage, which was never registered. Subsequently the second encumbrancer, who had not been paid, claimed priority over the plaintiffs. They then obtained an assignment of the first mortgage.

Held, that the discharge of mortgage not having been registered, operated only as a receipt, and the amount paid the first encumbrancer being paid by the Trust and Loan Company, and not by the original mortgagor, that the plaintiff was entitled to priority to the extent of the first mortgage.

Marsh, for the plaintiffs.

Snelling, for the defendant, *Rocque*.

ELECTION CASES.

Re Cornwall Election Petition.

Armour, J.] [Aug. 26.

Election petition—Commission to examine a witness.

Held, that in proceedings under a petition filed in accordance with the provisions of the Dominion Controverted Elections Act, 1874, a commission may be issued to examine a witness who resides in a foreign country.

CANADA REPORTS.

ONTARIO.

MARITIME COURT.

(*Reported for the* Law Journal *by* J. Bruce, *Esq., Registrar*).

Re The Tug "Kate Moffatt."

Jurisdiction.

Held, that the Maritime Court of Ontario has no jurisdiction in respect of claims that accrued before the proclamation bringing into force the Maritime Court of Ontario.

This was a cause of wages instituted in this court by John Hand against the American tug *Kate Moffatt*, to recover the sum of $568.15. The defence set up was, that a portion of the plaintiff's claim accrued before the issue of the proclamation bringing into force the Maritime Jurisdiction Act of Ontario.

Brough, for petitioner.

W. R. Meloch, for defendants.

Mackenzie, J. M. C. O. :—The Maritime Jurisdiction Act, 1877, received the Royal Assent on the 28th of April, 1877, and the Act came into full operation, under the authority of a proclamation of the Governor in Council, on the 18th of February, 1878. The plaintiff's claim accrued on the 6th of December, 1876. It has already been decided in this Court, in the cause of the *Edward Blake*, that a contract for wages entered into before the passing of the Maritime Jurisdiction Act, but not completed until after the passing of the Act, came within the jurisdiction of the Court, and that the balance of wages then due formed a maritime lien on the ship; a similar doctrine was recognised by the English Court of Chancery, in *Page* v. *Bennet*, 29 L. J. Ch. 398. But a balance of wages falling due a year and a half before the passing of the Act and the formation of the Court itself is a very different thing. Mr. Brough contended that the Maritime Jurisdiction Act was a remedial statute, and was retrospective in its operation, and cited Maxwell on Statutes, pp. 199 and 202, the case of the *Alexander Larsen*, 1 Robinson A. R. 288, and the case of the *Ironsides*, 31 L. J. N. S. P. M. & A. cases, 129, and other authorities. The jurisdiction of this Court rests upon the 1st section of 40 Vict. chap. 21, which enacts that, "save as by this Act excepted, all persons shall, after this Act comes into force, have in the Province of Ontario the like rights and remedies, including cases of contract and tort, and proceedings *in rem* and *in personam*, arising out of or connected with navigation, shipping, trade or commerce, on any river, lake, canal, or inland water of which the whole or part is in the Province of Ontario, as such person would have in any existing British Vice-Admiralty Court if the process of such Court extended to the said Province." By section 2 it is enacted, "For the enforcement of such rights and remedies the Maritime Court is constituted, and shall have, as to the matters aforesaid, all such jurisdiction as belongs in similar matters within the reach of its process to any existing British Vice-Admiralty Court." By section 21, "so much as relates to the appointment of the Judge, Surrogate Judges and Officers, and the making of general rules and tariffs, shall come in force on a day to be appointed by proclamation of the Governor in Council; and the residue of this Act shall come in force on a subsequent day, to be also appointed by such proclamation." It is not to be lost sight of, in deciding the question of jurisdiction, that the Maritime Jurisdiction Act did not come into operation immediately after its passing. In discussing the merits of *Marsh* v. *Higgins*, 9 C. B., 551, the learned author of Maxwell on Statutes remarks, "Some stress also was laid on the circumstance that the Act did not come into operation until eight months after its passing." The Dominion Maritime Jurisdiction Act did not in reality come into force for ten months after its passage; that did not appear on the face, yet still enough appeared to show that it could not come into operation for several months. Has the Maritime Jurisdiction Act retrospective operation?

In Maxwell on Statutes, at page 191, I find the law thus stated: "It is a general rule that all statutes are to be construed to operate in future, unless from the language a retrospective effect be clearly intended. *Nova constitutio futuris formam imponere debet non preteritis.* "It has been said that nothing but clear and express words will give a retrospective effect to a statute, and that however much the present tense may be used in it, it must be construed as applying only to future matters." In *Vansittart* v. *Taylor*, 4 E. & B. 910, even a statute which confers a benefit, such as abolishing a tax, would not be construed retrospectively to relieve the persons in the property already subject to the burden before it was abolished. And at page 192 the learned author proceeds: "It is where the enactment would prejudicially affect vested rights or the legal character of past acts that the presumption against a retrospective operation is strongest; every statute which takes away or impairs vested rights under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation." However, the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts. In the case of the *Alexander Larsen*, 1 Robinson Ad. Rep. 288, cited by Mr. Brough, would at first give countenance to the contention of the plaintiff. The learned Judge of the High Court of Admiralty (Dr. Lushington), at page 295, states: "I am not aware of any principle or decision which establishes the doctrine that where a statute affords a new mode of suing, the cause of action must necessarily arise subsequent to the period when the statute comes into operation." On the contrary, where the statute creates a new jurisdiction, the new jurisdiction, I apprehend, takes up all the cases. The *Alexander Larsen* was a Norwegian ship, and was arrested to satisfy a claim for £45 13s. 0d., the price of an anchor and cable furnished to the vessel before the Imperial Statute 3 & 4 Vict. came into operation. The 6th section gave the Court of Admiralty jurisdiction, among other things, to decide on claims for necessaries furnished to any foreign ship or vessel, and to enforce payment thereof. The Court was in existence and had power to enforce payments in regard to ships or vessels before. It will be seen the present case cannot be controlled by the ruling of the Court of Admiralty in the *Alexander Larsen*.

The case of the *Ironsides*, L. J. N. S. Admiralty cases, 129, is cited. Dr. Lushington stated in that case: "In the general principle I entirely concur, viz.—that, as a general rule, all statutes should be construed to operate prospectively, and especially not to take away or affect vested rights; but true as these rules are—indeed admitted on all hands as founded on common justice and authority—no one denies the competency of the Legislature to pass retrospective statutes, if they think fit; and many times they have done so, bearing in mind the general principle. The question must always be, what intention the Legislature expressed in the Statute to be construed. The presumption is that it is not retrospective. The facts and circumstances connected with the case of the *Ironsides* cannot help us in coming to a sound conclusion so far as I can see.

In the case of *Moon* v. *Durden*, reported in 2 Ex. 22, the arguments of counsel and the judgments delivered by the learned Barons of the Exchequer are instructive and exhaustive. The 18th section of the 8 & 9 Vict. cap. 109, which received the Royal Assent on the 8th August, 1845, enacts "that all contracts by way of gaming or wagering shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made." Barons Parke, Alderson and Rolfe held "that the statute had not a retrospective operation so as to defeat any action for a wager com-

menced before the statute passed. Baron Platt dissented. The general principle governing the construction of statutes, viz., "that no statute is to have a retrospective operation beyond the time of its passing," is fully recognised and acted upon in this important case. The case of *Vansittart* v. *Taylor*, 4 E. & B. 910, the case of *Roseberry* v. *Ingliss*, Macqueen's Practice in the House of Lords, and several other well known English cases, treat on the subject of the retrospective operation of statutes. *The Queen* v. *Taylor*, Supreme Court Reports, 65, has, in my opinion, a direct and immediate bearing on the present case. The Supreme Court was created as a new court of appellate jurisdiction by a statute of the Dominion. The Maritime Court was created as a new court, invested with a new and extensive jurisdiction. In the case of *The Queen* v. *Taylor*, the Attorney-General of Ontario filed an information in our Court of Queen's Bench against the defendant, Taylor, a brewer in the town of St. Catharines, for selling a large quantity of beer without a license. The defendant demurred to this information, and the Attorney-General joined in demurrer. The Queen's Bench gave judgment for the defendant on the demurrer, on the 12th of May, 1875. The Attorney-General took the case, by writ of error, to the Court of Appeal for Ontario. On the 25th of September, 1875, our Court of Appeal reversed the judgment of the Queen's Bench—not an unusual thing. The defendant appealed from the judgment of the Court of Appeal to the Supreme Court at Ottawa. The Proclamation of the Governor-General, calling into exercise the judicial functions of the Supreme Court, issued on the 10th of January, 1876. The case was set down for argument for the first sittings of the Supreme Court, held in June, 1876, when the question of whether the Supreme Court had jurisdiction was discussed. I was one of the counsel for the Attorney-General. Afterwards the Supreme Court gave judgment, and held it had no jurisdiction when the judgment appealed from was signed, entered or pronounced previous to the 11th of January, 1876. Sir William Richards, then the Chief-Justice of the Court, and Mr. Justice Ritchie, now the Chief-Justice, gave able and elaborate judgments, which, in the main, were assented to by Strong, Taschereau and Fournier, J. J. Mr. Justice Ritchie, at page 88, stated, "I can see no reason why this statute—Supreme Court Act—should have a retrospective operation, inasmuch as I cannot consider the creation of a court and the right of appeal thereto mere procedure, and I discover no language in the statute indicating that, in its construction, the *primâ facie* rule that statutes ought to be construed to operate in the future was to be departed from. When the enactment changes or takes away rights it is not to be construed as retrospective, and further," the learned Judge remarks, "I think the creation of the right to appeal is by no means a mere matter of procedure, but it is a matter of jurisdiction, of limitation and extension of jurisdiction, by which the rights of suitors may be materially affected. "The Maritime Jurisdiction Act does not appear to be a remedial statute in the sense suggested. It creates a new jurisdiction, new rights and liabilities, to be governed and regulated by the statute itself. The preamble of the Maritime Jurisdiction Act and its title indicate that the intention of the legislation was to create a new independent jurisdiction, a maritime jurisdiction, and a new court to enforce the observance of the rights and afford remedies peculiar to itself. The Maritime Act invests the great fresh-water lakes of Ontario, its navigable rivers, its extensive canals, with new attributes and maritime consequences which did not belong to them before the passage of the Maritime Act. The youthful (I think the expression may be used) inland waters of Ontario are placed, in a maritime sense, on the same footing as the venerable and antiquated high seas and waters within high-water marks, and all navigable waters beneath the first bridges, and makes navigability the true test of maritime jurisdiction. This is an alteration of a system, and the advent of a new order of things in regard to the inland waters of the Province. Before the Maritime Act passed, ships and vessels might pass and repass in these

waters, none daring to make them afraid. A maritime court warrant could not reach them, a marshal could not arrest them. The owners of vessels and mortgagees had no dread of the firm grasp of a marshal or the power of the Admiralty Law. Vessels then had existing rights—vested rights; men were employed and vessels set out on voyages under the then existing laws. The marshal of this court can now arrest a vessel, her cargo, freight and apparel, and stop the progress of the ship until right is done. Surely this must be a new right, a new power, a new jurisdiction, an interference with substantial rights and privileges. In this view of the case, the statute is, in my opinion, not retrospective in this respect, but prospective. Before the passing of the Maritime Jurisdiction Act, the Province was looked upon as an inland Province, while the Provinces of Quebec, New Brunswick and Nova Scotia were called the Maritime Provinces. So far as maritime authority is concerned, it may be looked upon as maritime. It has the same authority on the inland waters, on Lakes Ontario, Erie, Huron and Superior as the Vice-Admiralty Courts have on the waters of the Gulf of St. Lawrence, the Bay of Fundy, the Straits of Northumberland, the Lower St. Lawrence and Gaspé Bay. The Ports of Toronto, Kingston, St. Catharines, are as much maritime ports as Quebec, St. John or Halifax. As I am of the opinion that the statute is prospective it is unnecessary to discuss any of the other points. The petition will be dismissed, but as the question involved is new and important it will be without costs.

Petition dismissed without costs.

INSOLVENCY CASES.

Re Robinson, an Insolvent.

Watch—Ordinary wearing apparel.

A watch and chain which an insolvent had been in the habit of wearing, and of no great value, comes within the exemption applicable to the necessary and ordinary wearing apparel of the debtor, and the insolvent will not be ordered to give them up to the assignee.

[Toronto, January 22, 1879.

This was an application on behalf of the assignee under section 143 of the Insolvent Act of 1875, for an order requiring the insolvent to deliver up to the assignee his watch and chain.

The assignee, by his petition, claimed the watch and chain, as a matter of right, as part of the property which passed to him by the assignment.

Bigelow, for the insolvent, contended that the watch and chain in question did not and should not pass under the circumstances to to the assignee. He filed an affidavit of the insolvent showing, that he, the insolvent, had the watch in question for about five years and the chain for six years. The watch originally cost $30. He also filed an affidavit of a manufacturing jeweller who examined the articles in question and said they were worth about twenty dollars.

Shepley, contra.

McKenzie, Co. J.—Section 16 of the Insolvent Act of 1875 vests in the assignee all property of the insolvent, except such real and personal property as are exempt from seizure and sale under execution by cap. 66 of the Revised Statutes of Ontario, sec. 2, sub 2. "*The necessary and ordinary wearing apparel of the debtor and his family*"—is by this exempt from seizure under any writ of execution.

My attention was directed to *In re Sanborn*, an insolvent, 14 C. L. J. 241, wherein Judge Elliot (Middlesex) explains his views of the law in this respect, accompanied with very sensible remarks.

The question is, whether the watch and chain in question, of the insolvent, valued at about $20, and which he had been wearing on his person upwards of four years came under the exemption of "necessary and ordinary wearing apparel." If they do the insolvent has a right to withhold them from the assignee; if not, he must deliver them up. I am of opinion that the watch and chain in question do come within the statutory exemption, and may be withheld by the insolvent.

Among the definitions given of the word "apparel," may be mentioned "dress," "clothes," "attire," "raiment," "external habiliments."

There is a distinction taken between wearing apparel and necessary wearing apparel in *Spitten* vs. *Chaffer*, 14 C. B. N. S., 714. A watch is a very useful and sometimes a necessary gear; it will inform us as to time, and direct our movements in regard to appointments; when a man is asked the time to go and meet a train or go to a meeting, he pulls out his watch and ascertains the time. In some occupations a persons cannot do without a watch. Thousands of the human race wear external habiliments which may not be necessary but are ordinary and in common use. Fashionable apparel and showy ornaments are among the foibles of our ages, still men and women do not think so, so that they embellish their persons with ornamental things and external habiliments of many kinds, and when within their means and in common use among the inhabitants they appear to become ordinary apparel.

[The learned Judge then quoted the language of the judgment in *Re Sanborn*.]

The watch and chain in question are common and inexpensive, and the insolvent owned them for several years. Following, as I do, the doctrine laid down in *Re Sanborn* I refuse the prayer of the petition. I look upon the watch and chain in question as common and inexpensive, and may be treated as ordinary apparel in ordinary use. If the watch and chain, instead of being of the value of twenty dollars, were worth $150 or less, and had been recently purchased, I would do what was done in *Re Sanborn*; but because they are common and inexpensive and worn on the person of the insolvent for several years, I decline to make an order of delivery.

Order refused.

MUNICIPAL CASES.

Bryan v. Corporation of Ontario.

High Constable—Remuneration—Liability of County.

A County Council is not liable for the salary of the High Constable.

[Whitby, July 2, 1879.

This was an action to recover one quarter's salary, claimed to be due on 1st April, 1879, to the plaintiff, as High Constable of the County of Ontario.

The plaintiff was appointed in 1874, by the Justices in General Sessions, under Revised Statutes of Ontario, cap. 82, sec. 1. They also proposed a resolution fixing the salary at $75, which sum was subsequently raised to $150, and the Treasurer of the County paid it regularly until this suit.

In February, 1879, the plaintiff was notified of a resolution of the council forbidding the Treasurer to continue such payments; whereupon the plaintiff sued.

Dartnell, J. J. The office of High Constable was first ordained by the Statute of Winchester (13 Edw. I. ch. 2, sec. 6). They were appointed at the Courts-leet of the hundred, or franchise, over which they presided, or in default of that by the Justices in Session.

The High Constable has the superintendance and direction of all petty constables within the county; and is, in a manner, responsible for their conduct, since he is bound to notice and to present their defaults: for his neglect of which duty he is representable himself (Burns Justice, 644). In England he has many other duties imposed upon him by various statutes, so that he is there an important municipal officer.

The R. S. O., ch. 82, while giving the power of appointment of constables to the Justices in Sessions, is silent as to how they shall be paid. The fees are fixed by R. S. O., ch. 84: the tariff makes no distinction between high and petty constables.

Before the establishment of municipal institutions in this country, the Justices had control of the county funds, and perhaps could pass a resolution providing for the payment of the high constable's salary. Since that time these duties have been limited; the Justices have simply the power of appointment, and, in my opinion, have no right to fix any sum for his salary, or to say that he shall have any salary at all. The office seems one of *rank* only, giving the appointee merely precedence and authority over the remaining constables of the county. Two instances occur to me in which one body appoints, while the duty of paying the official devolves upon

another. I allude to the office of chief of police in cities and gaolers in counties. In the former case the police commissioners make the appointments, and the council is required to pay him a "reasonable salary," and it has been held that it is not in the commissioners, power to fix what that salary may be (*Prince* v. *Toronto*).

In the latter case, the sheriff appoints, while the county council is to fix and pay the salary.

I think, if the legislature intended the high constable to receive a salary, or any sum beyond ordinary fees, they would have so expressed themselves. No doubt the defendants could make themselves liable by resolutions or by-laws, but there is no pretence that they have done so.

I think, however, that although the defendants are not liable for any future payments, they should, in equity, pay the salary for the one quarter upon which the plaintiff had entered, and for which he has performed the duties. On that ground only I give judgment for him for the amount claimed, being, however, of the opinion that the defendants will not be liable for any future payments.

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR NOVEMBER AND DECEMBER, 1878, AND JANUARY, 1879.

[This number includes the following of the Law Reports: 9 Ch. D. 1-734; 10 Ch. D. 48; 3 Q. B. D. 643-807; 4 Q. B. D. 1-18; 3 C. P. D. 393-537; 4 C. P. D. 1-24; 3 Ex. D. 313-383; 4 Ex. D. 1-31; 3 P. D. 73-198; 3 App. Cas. 933-1373.]

Abandonment.—See Insurance, 2.

Accounts.

1. In a bill by principals against agents, to take accounts or rectify accounts already settled, the transactions extended over nearly twenty years, and many errors and overcharges were alleged. *Held*, that although the labour was enormous, it was a case for reopening the accounts, and not merely one to "surcharge and falsify."—*Williamson* v. *Barbour*, 9 Ch. D. 529.

2. In the settlement of partnership accounts made in 1865, the plaintiff alleged a single error of £950, and another formal error. *Held*, that, their being no fraud, he be allowed to surcharge and falsify, thus allowing the account to stand as a whole, and only rectifying it where the plaintiff should plainly show error.—*Gething* v. *Keighley*, 9 Ch. D. 547.

See Partnership.

Acquiescence.—See Bankruptcy, 2.

Administration.

The Probate Division granted a general probate of the will of a Scotch testator. In spite of the opposition of a majority of the executors, this Division granted the usual decree for administration of all the personal assets, not limiting it to those in England.—*Stirling-Maxwell* v. *Cartwright*, 9 Ch. D. 173.

See Parties.

Advances.

By his will, made in 1864, a testator made his six children his residuary legatees, and provided that the sums which he had lent to his two sons should be deducted from the shares which they would be entitled to. Subsequently he wrote to each of his sons, offering to write off part of the debt in each case, if the son would send him a promissory note for the balance. It did not appear that any notes were given. He died in 1874. *Held*, that, in spite of the letters, the sons must bring the entire debts into hotchpot.—*Smith* v. *Conder*, 9 Ch. D. 170.

Ancient Lights.—See Railway, 1.

Annuity.

G. gave a legacy to his wife and empowered his trustees to demise portions of his real estate for terms of years, for building purposes and otherwise, as they thought proper, during his wife's life, to sell and dispose of the property, and to invest it so as to raise an annuity of £1,200 for her during her life, payable quarterly. Subject to the annuity, the trustees were to set apart other portions of the income for his children. The residue he gave to his children. The yearly income of the trust estate did not amount to £1,200. *Held*, that the widow could not have it made up out of the *corpus*.—*Gee* v. *Mahood*, 9 Ch. D. 151.

See Trust 1; Will, 3.

Appointment.

P., the donee of a power to appoint by deed or will, in favour of her "issue respectively to be born before any such appointment," recited, in her deed of appointment, the power, her desire to act under it, and that she had three children, and appointed the fund to her daughter F. for life, and, at her decease, to her children, in equal shares, on their respectively attaining twenty-one; but if any of them should die before that age, leaving issue, then the share of them so dying should go to their issue, vesting at twenty-one. If the said F. should have but one child attaining twenty-one, to that child absolutely. In case F. should die without leaving any child or issue who should take a vested share in the trust-fund, another disposition was made. F. had six

children. Two were born before the date of the appointment, and another was then *en ventre sa mère*. F. died in 1874, and in 1877 only one of her children had attained twenty-one. *Held*, that the power gave authority to appoint only in favour of the three in existence at the date of the appointment; that the appointment undertook to include all the six children. Hence it was effectual only as to a sixth of the fund for each of the three objects entitled. One-sigth ordered paid to the child having attained twenty-one, the remaining five-sixths to lie in court.—*In re Farncombe's Trusts*, 9 Ch. D. 652.

Assignment.

T. contracted with J. to build him a steam launch for £80, to be paid when the boat was done. J., however, advanced him £40 on account. Afterwards, before the work was done, T. being in debt to R., agreed to make over to him the other £40, and he wrote to J.: "I hereby assign to R. the sum of £40, or any other sum now due or that may hereafter become due in respect of" the boat. J. promised to give the matter his attention. *Held*, that the letter was not an order to pay money, but an assignment of a debt.—*Buck* v. *Robson*, 3 Q. B. D. 686.

See Insurance, 1; Mortgage, 5.

Attorney and Client.—See Solicitor.

Bankruptcy.

1. The old rule in bankruptcy, that, "if there is a legal debt, and the person coming before the court [to petition for an adjudication] in respect of it is not the beneficial owner, there must be brought before the court also the beneficial owner" if he is a person not under disability, is still in force.—*Ex parte Culley. In re Adams*, 9 Ch. D. 307.

2. D. and C., partners, petitioned in liquidation, Dec. 4, 1876. Dec. 19, the creditors, under a vote to liquidate by arrangement, appointed B. trustee with a committee, who were empowered to discharge the debtors, if they thought fit. Jan. 3, 1877, the committee voted to discharge D., subject to the payment of his private debts, and to discharge C. on his paying 15*s.* in the pound, as follows: The stock-in-trade and debts due were to be realized by him under the committee's inspection, and the proceeds paid to them. If the amount realized equalled 7*s.* 6*d.* in the pound and costs, C. should have his discharge on paying 7*s.* 6*d.* in the pound additional thereon. D. was discharged, Jan. 24, 1877. C. received £719 8*s.* 9*d.*, which he paid the committee, and paid B. £60 costs. 7*s.* 6*d.* in the pound on the debts proved came to £950, and C. made up the balance. Before the liquidation, C. had effected a loan, on behalf of himself and his firm, with the A. Bank. by giving a mortgage of some real estate and insurance policies, containing a power of sale. At the liquidation, the debt amounted to £251 7*s.* 6*d.* The bank did not prove. C. began business alone in February, 1877, before which he asked for a new credit on his securities with the A. Bank. The manager consulted B., who said the matter was "all right, and quite out of his hands." The bank then gave C. credit, and his business went on. Feb. 22, he paid part of the firm debt due the bank, and July 25, 1877, the balance. From the time of beginning business alone, all but one of his old creditors who had proved did business with him and gave him credit. He did not pay the second 7*s.* 6*d.* in full, and some others partly, by checks on the A. Bank. The creditors applied for the second 7*s.* 6*d.* to B., but not to C. July 18, he sold his real estate, the bank reconveyed it, and the purchase-money was passed to his account in the bank. July 31, B. demanded the purchase-money. In August C. went into bankruptcy. *Held*, that the bank was entitled to retain all its advances, both to the firm of D. and C. and to C. alone, and B. was entitled to the balance only.—*Ex parte Bolland. In re Dysart*, 9 Ch. D. 312.

See Felony; Jurisdiction, 2; Set-off.

Beneficial Owner.—See Bankruptcy, 1.

Bequest.—See Will, 5, 7, 8.

Bill of Lading.

The plaintiffs shipped two hundred and eighty bags of sugar on the defendant's ship, under a bill of lading signed "P. and K., Agents." The court found that they were the agents of the defendants to give this bill, though without the knowledge of the plaintiffs. P. and K. were charterers of the ship for the voyage. The bill of lading undertook that the sugar should be delivered in good condition, excepting the usual risks, and "any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed that the captain, officers, and crew of the vessel, in the transmission of the goods as between the shipper, owner, or consignee thereof, and the ship and ship-owner, be considered the servants of such shipper, owner, or consignee." Some oxide of zinc in casks was negligently stowed on board in such a way that the sugar was damaged by it. *Held*, that the damage was not within the exceptions in the bill of lading, and the defendants were liable.—*Hayn* v. *Culliford*, 3 C. P. D. 410.

See Charter-party, 2.

Bill of Sale.—See Mortgage, 4; Sale, 2.

Bills and Notes.

Suit by plaintiff, as endorsee on a bill of exchange, against L. & F., partners, the defendants, as acceptors. C., the plaintiff's partner, gave the plaintiff, for a debt, the bill in suit, purporting to have been accepted by L. & F., and perfect in every respect, except that the drawer's name was left blank. F. had accepted the bill without the knowledge of L. and having no authority to accept for the firm. The plaintiff took the bill in good faith, believing the acceptance *bonâ fide*, but afterwards, suspecting something wrong, he filled in his own firm's name as drawer. *Held*, that he could

not recover against L.—*Hogarth* v. *Latham*, 3 Q. B. D. 443.

Breach of Promise of Marriage.—See Infancy.

Charge.—See Trust, 1.

Charity.—See Will, 4.

Charter-party.

1. The defendant, owner of the ship R., entered into a charter-party with the plaintiff, that, "after loading with dead weight at M. for the owner's benefit," she should proceed to a first-class Spanish port, where "a steamer with cargo from a foreign port can load by Spanish law without risk of detention by the custom-house authorities." She loaded with military stores as "dead weight" at M., which plaintiff knew would prevent her being admitted at such Spanish port, and proceeded to V., a first-class Spanish port. On application to the Spanish authorities for special permission to load, notwithstanding the prohibited dead weight, it was refused, contrary to the expectation of the defendant, and the R. at once sailed away. The charter-party contained the usual clause, "The act of God, the Queen's enemies, fire, and all and every other the dangers and accidents" of navigation excepted. *Held*, that the plaintiff could not maintain an action against the defendants for not loading at V.—*Ford* v. *Cotesworth* (L. R. 4 Q. B. 127; s. c. 5 Q. B. 544) followed.—*Cunningham* v. *Dunn*, 3 C. P. D. 443.

2. Charter-party to load a cargo of bark at a port in Australia, and proceed to an English port, at 60*s.* a ton freight in full, "ship paying all port charges, pilotages, and towages, the freight to be paid in cash on right and true delivery of cargo at port of discharge, less any advances that may have been made. The captain to sign bills of lading for cargo as presented, at any rate of freight required by charterers or their agents, without prejudice to the charter-party; but should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid to the master in cash before sailing." A bill of lading was signed by the plaintiff, the captain, and given to the charterers before sailing. The goods were deliverable "unto order, or his or their assigns; average as accustomed; freight for the said goods to be paid in cash at port of discharge, at the rate of discharge, rate of freight, and other conditions as per charter-party, with 5 per cent. primage, in cash, on delivery, as customary." The defendants were indorsees of the bill of lading from the charterers, and received the cargo as their agents. The captain received a fixed salary which included all charges and allowances. *Held*, that primage could not be recovered.—*Caughey* v. *Gordon*, 3 C. P. D. 419.

3. A ship's husband cannot cancel a charter-party already entered into, though he have authority to make one, and though such cancellation would profit the owners.—*Thomas* v. *Lewis*, 4 Ex. D. 18.

Collision.

The court found that, while a ship was in charge of a pilot within a district where the ship was obliged, by statute, to employ such a pilot, she dragged her anchor and got into collision with a bark, wholly through the negligence of the pilot. *Held*, that the shipowners were not responsible for the damage.—*The Princeton*, 3 P. D. 90.

See Evidence.

Company.

1. Under a contract not registered as required by the Companies Act, 1867 (30 and 31 Vict. c. 131), shares in a limited company were allotted to the party with whom the company made the contract, as fully paid up shares, and were duly registered by the company as such. The shares were subsequently transferred for value, as fully paid up shares, to N., the respondent, who had no notice of any irregularity in their issue. On the winding up of the company, *held*, affirming the decision of the Court of Appeals, that the company was estopped to deny that the shares were paid up, and that N. could not be put on the list of contributories, as the holder of shares not fully paid up. As he took them for consideration in the regular course of business, the burden of showing that he took them with notice of the irregularity in their issue is on the party asserting such notice.—*Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004; s. c. *nom. Re British Farmers' Linseed Cake Co.*, 7 Ch. D. 533; 12 Am. Law Rev. 724.

2. A syndicate, composed of ten members, was formed to purchase the island of Sombrero, in the West Indies, then offered for sale by the liquidator of an unsuccessful company holding a lease of it. In pursuance thereof, a purchase was made by one Evans, a paid agent of Baron Erlanger, one of the syndicate, and the sale was confirmed by the court. About the same time, the syndicate determined to get up a company. The said Erlanger had charge of the matter, and finally an agreement was signed between Evans and one P., on behalf of the proposed company, for the purchase of the island by the latter for double the price paid by the syndicate. The company was registered the same day. The directors were five in number, as follows: Drouyn de Lhuys, the French statesman, resident in France; Eastwick, M. P., resident in Canada; T. Dakin, Lord Mayor; the said Evans; and Macdonald, an English rear-admiral without means, to whom Erlanger advanced money enough to pay for shares, by virtue of holding which Macdonald could be a director. Dakin and De Lhuys alone held shares *bona fide*, as required for the office of director. Dakin was not a member of the syndicate. The first two did not attend the meeting at which the purchase was confirmed. It appeared that the entire board of directors was made up by Erlanger. At the end of a year, the affairs of the company were in a bad way, and the truth about the price having leaked out, a committee was appointed to examine into the company's affairs, and on their

recommendation the old directors were retired, and suit brought against Dakin and the members of the syndicate for the difference between £110,000, the price paid Evans by the company, and £55,000, the price paid by the syndicate, or to rescind the contract. *Held*, that the contract could not be maintained.—*Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218; s. c. 5 Ch. D. 73; 12 Am. Law Rev. 91.

3. H. acted as director for a company, but stated that he accepted the office on the distinct understanding that no share qualification was necessary, and none was in law necessary. He also said he never intended to take any, and did not know, until winding up proceedings were taken, that he had been put on the register of shareholders. But by a vote of the directors, at a meeting when he was absent, his name was put on, and shares allotted him, *Held*, that he was not a contributory. As director, he was not presumed to know the contents of the company's books.—*In re Wincham Shipbuilding, Boiler, & Salt Co. Hallmark's Case*, 9 Ch. D. 329.

4. P., J., & W. were made and acted as directors of a company, and subscribed for shares, but had never paid anything. They personally guaranteed a loan from a bank to the company. The bank got judgment against them, and thereupon the directors of the company resolved that "in order to reduce the balance at the" bank, the directors be recommended to pay for their shares, "as contemplated in the company's prospectus," and as authorized by the articles. At the same time, it was voted to sell out the property of the company and discontinue business, and this was done. P., J., & W. paid for their shares, and this sum was passed to the company's credit at the bank. On winding up, *held*, that, by this payment P., J., & W. had discharged themselves as guarantors and committed no breach of trust towards the company.—*In re Wincham Shipbuilding, Boiler, & Salt Co., Poole, Johnson, & Whyte's Case*, 9 Ch. D. 322.

5. A contributory cannot set off a debt due him from a company in voluntary liquidation against a claim for calls, whether made before or after the liquidation. *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175, criticised. *In re Whitehouse*, 9 Ch. D. 595.

6. The articles of a company provided that no person should "be eligible as director, unless he holds, as registered member in his own right, capital of the nominal value of £500." The plaintiff, a registered shareholder to that amount, mortgaged his shares, though they still stood in his name, and he was subsequently elected director. The mortgagee by mistake, as plaintiff said, subsequently had the shares transferred to his name, and the other directors refused the plaintiff a seat. *Held*, that he could have an injunction against them for excluding him, and that the article did not mean that the shares should be held in beneficial ownership.—*Pullbrook* v. *Richmond Consolidated Mining Company*, 9 Ch. D. 610.

Condition.—See Contract, 1, 2; Sale, 2.

Construction.—See Contract, 3; Seisin; Trust, 1; Will, 2, 3, 6, 11.

Contract.

1. Eight persons made an agreement to convey certain land to two of their number by an absolute deed, and that the two should sell the same in lots and hold the proceeds in trust for the eight. The defendant, in April, 1875, made a verbal offer to W., agent of the owners for the sale of the lots, for some of them. W. told him that he must purchase subject to certain conditions printed on a plan of the lands, and which W. made known to him. The last condition was to the effect that each purchaser should sign a contract embodying the conditions, the payment of a deposit, and the completion of the purchase within two months from the date of the contract. W. promised to lay the offer before the "proprietors" and soon after wrote the defendant that the "proprietors" had accepted the offer, and asking about his wishes as to the title. The next day defendant wrote in reply, saying that unless he was at liberty to build or not (referring to one of the conditions), the offer had better be reconsidered. The next day W. answered, saying that the acceptance was unconditional, and the defendant could do as he pleased about building. Soon after the defendant wrote, declining to go on. On a suit for performance, *held*, that the correspondence constituted a contract, and the provisions as to signing a formal contract was not a condition precedent, and did not suspend the concontract made. The designation of W.'s principals as the "proprietors" was sufficient to satisfy the Statute of Frauds.—*Rossiter* v. *Miller*, 3 App. Cas. 1124; s. c. 5 Ch. D. 648; 12 Am. Law Rev. 316.

2. The defendant, a builder, made a tender to do work, giving sufficiently full particulars, in the opinion of the court, to designate the conditions definitely enough. The plaintiff, an architect, answered, accepting the tender, and added that his solicitors would "have the contract ready for signature in a few days." Defendant, finding that he had made a mistake in his tender, withdrew it. *Held*, that the tender and acceptance made a contract, the document to be made by the solicitor being merely to put the contract in form. —*Lewis* v. *Brass*, 3 Q. B. D. 667.

3. A contract for building iron buildings, for a lump sum of £25,000, provided that the owners might make alterations or additions therein, allowing therefor at schedule rates; but that a written order of their engineer, authorizing the changes, should be requisite in all cases to bind them beyond the written contract, and "no allegation, by the contractors, of knowledge of or acquiescence in such alterations or additions on the part of the" owners, should be "available as equivalent to the certificate of the engineer, or in any way superseding the necessity of such certificate as the sole warrant for such alterations." No payment was legally due till the work was done;

but payments up to a certain percentage of the work done might be made on the certificate of the owner's engineer. As to castings, payment might be made to within twenty-five tons of the whole amount furnished to the time of such payment, the engineer to certify approximately the amount so furnished, from time to time, as a basis of payments; but the owners were never to be liable for more weight than was specified in the drawings making part of the contract. The contractors found it not feasible to cast certain mouldings of the weight specified, and, after stating the case to the owner, made them heavier, and the engineer, in his return certificate, returned the weight furnished, as thus increased. In an action by the contractors, for extras beyond the contract, by reason of these heavier castings, *held*, that no recovery could be had beyond the contract price; the certificate of the engineer, made with reference to the payments, did not amount to a written order authorizing alterations under the contract.—*The Tharsis Sulphur & Copper Co.* v. *M'Elroy*, 3 App. Cas. 1040.

See Sale, 1; Solicitor, 3.

Contributory.—See Company, 1, 3, 4, 5.

Conversion.—See Vendor and Purchaser.

Costs.

1. The Court of Appeals *held* that a bill for short-hand notes of proceedings on a hearing before the Vice-Chancellor could not be allowed under a general order for costs, notwithstanding that the solicitors of the parties had agreed to have the bill included.—*Ashworth* v. *Outram*, 9 Ch. D. 483.

2. Brief copies of short-hand notes for the use of counsel, on a reference, will not be allowed under an ordinary order for costs, where not specially mentioned, and in the absence of any agreement of the parties.—*Wells* v. *The Mitcham & Wimbledon District Gas Light Co.*, 4 Ex. D. 1.

See Husband and Wife; Solicitor, 2.

Covenant.

The trustees for sale of a mansion-house and land connected sold, in 1845, two pieces thereof to S., who covenanted with the trustees and their assigns not to build on the lands within a certain distance of a road leading "to the mansion-house and property belonging to the said trustees," and made certain other covenants, looking, as the trustees asserted, to the preservation of the whole property for purposes of private residences; but it was not stated that the covenants were for that purpose. The trustees afterwards sold other pieces under similar conditions. In 1854, the the trustees sold the mansion-house estate to B., and in 1870 his devisees sold it to the plaintiffs. These conveyances contained no covenants like those in the deeds to S., but contained other restrictive covenants. They did not refer to the conveyances to S., nor to any of the other conveyances. Meantime, the devisee of S. sold a part of his purchase to G., who in turn sold to the defendants. The deed to G. contained substantially the same covenants as were found in the deed of the trustees to S. The plaintiffs sued the defendants, on the original covenants, for carrying on manufacturing on their property in violation of the covenants, by which the mansion-house was injured, and the whole property diminished in value for private residences. There had been nothing said, when B. bought of the trustees or sold to the plaintiffs, about the purchasers having the benefit of the covenants made by S. with the trustees. *Held*, that the plaintiffs could not sue the defendants on the original covenants in the deeds to S., although they were the assigns of the trustees.—*Renals* v. *Cowlishaw*, 9 Ch. D. 125.

See Lease; Mortgage, 1; Settlement, 1, 3.

Creditor.—See Fraudulent Conveyance.

Criminal, Reward for Apprehension of.

G. committed forgery and absconded, and a reward was offered by the defendants. The handbills stated the facts, and that £200 reward would be paid "to any person or persons giving such information to A., superintendent of police at D., or to H., superintendent of police at W., as will lead to the apprehension of the said G." The plaintiff was chief constable at E., and a man presented himself there before him, and said, "You hold a warrant for me; I am wanted for forgery." Plaintiff asked his name, and the reply was, "You know already and hold a warrant." Plaintiff thought the man was drunk, left him alone in a private room, and examined a newspaper, where he found the advertisement, "G. wanted for forgery," and, getting the man to remove his hat, recognized him, from the description, to be G. Thereupon he telegraphed to A. at D., "Do you hold warrant for apprehension of G. for forgery?" The reply was, "I still hold warrant for G., and I should like him to be apprehended." Plaintiff then "apprehended" G., and he was convicted. *Held*, that plaintiff was not entitled to the reward, as G. surrendered himself.—*Bent* v. *Wakefield Bank*, 4 C. P. D. 1.

Damages.—See Negligence, 1; Vendor and Purchaser, 1.

Debenture Stock.

"Debenture stock [*i.e.* preferred stock] is a charge on the net profits and earnings of a trading corporation and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is." *Semble* also the same as to debentures. *Ashton* v. *Langdale*, 4 DeG. & Sm. 402; and *Chandler* v. *Howell*, 4 Ch. D. 651, overruled.—*Attree* v. *Hawe*, 9 Ch. D. 337.

Delay.—See Fraudulent Conveyance; Injunction, 1.

Director.—See Company, 2, 3, 4, 6.

Domicile.

A Frenchman came to England in 1844,

while still young, and lived there till his death in 1872. He was a shopman till 1851, when he formed a partnership with an Englishman in the French form. He married an English Protestant in 1852, in a Protestant church, and without Catholic rites, though he was a a Catholic. His wife died the next year. In 1853, he formed another partnership with an Englishman. In 1863, the partnership was renewed for ten years longer. In 1856, he married a Protestant whose father was French and mother English. They had three children, all brought up as Protestants, though the eldest, a son, was baptized in the Catholic form. For his second marriage, he got a certificate from the French consul. Beyond that, he took no step to have his marriage conform to French law. Before his first child was born, he made a will, invalid by French law, giving all his property to his wife. In 1872, he made another will, making use of provisions of English law and repugnant to French law. In the conduct of his business, the Paris branch was managed by an agent, and he only went there for visits of a few weeks at a time. There were in evidence some depositions of witnesses, that they had often heard him express an intention and a desire to return to France, and that in the Franco-German war he was patriotic and wished to join the French army. He refused to be naturalized, never leased a house for more than three years and said there were many advantages in being an alien, among them freedom from serving on the jury. *Held*, chiefly on the strength of his marriages, that he had acquired an English domicile anb abandoned his domicile of origin, and his estate was to be administered without regard to the law of France.—*Doucet* v. *Geoghegan*, 9 Ch. D. 441.

Easement.—See Railway, 1.

Ecclesiastical Law.

1. The Court of Arches has no jurisdiction to suspend a clerk in orders, *ab officio et a beneficio*, for disobedience to a monition from that court, to abstain from certain illegal practices in the services of the Church. Rule to Lord Penzance, official principal of the Arches Court of Canterbury, and one Martin, to show cause why a writ should not issue to prohibit that court from enforcing such a degree of suspension against the Rev. Alexander H. Mackonochie, clerk. *Held*, by Cockburn, C. J., and Mellor, J. (Lush, J., dissenting), that the writ should issue. (Cf. *Martin* v. *Mackonochie*, L. R. 3 P. C. 409, and *Hebbert* v. *Purchas*, L. R. 4 P. C. 301.)—*Martin* v. *Mackonochie*, 3 Q. B. D. 730.

2. In a criminal suit under the Church Discipline Act (3 and 4 Vict. c. 86), the Arches Court had suspended the delinquent clerk *ab officio et a beneficio*, for six months, for certain illegal practices in the church service, and a motion was made to enforce the suspension, on the ground that the clerk had repeated the offence; and, while the case was pending, the Queen's Bench, in *Martin* v. *Mackonochie* (3 Q. B. D. 730), decided that such suspension was beyond the jurisdiction of the Arches Court. *Held*, that though the Arches Court protested against that decision, it would "hold its hand" and "decline to proceed to compulsory measures at present." (Cf. *Coombe* v. *Edwards*, L. R. 4 A. & E. 390; 2 P. D. 354. —*Coombe* v. *Edwards*, 3 P. D. 103.

Estoppel.—See Company 1; Mortgage, 1.

Evidence.

1. S., with two friends, F. and D., went to the L. railway station to see a friend off for D., on the up-train from K. to D. at 11.30 p.m. As the train for D. was coming up, S. crossed the road to the ticket-office for his friend's ticket. When he had got it, and started to return, the D. train had come in, and was stationary, on the up-track. He crossed again, this time below the train, at the L. end, so that, when he was behind it he could not see either track at the D. end of the station. As he stepped from behind the D. train, upon the down-track, an express train for K. struck and killed him. F. and D. and the friend, who remained on the side opposite the ticket-office, swore they heard no whistle, though they were very near, and D. said he saw the train and heard it rumble, but heard no whistle. Employees of the road said they heard the whistle, and the engineer of the express train said he whistled as usual, according to a rule of the road. There was a notice-board at the point where S. crossed, warning the public not to cross there, and the railway had power to prohibit crossing there. But it appears that the public disregarded the notice, and the railway never enforced the rule, but acquiesced in the violation of it. *Held*, that, on this state of facts, the case was properly left to the jury. The jury, not the court, is to pass on contradictory and conflicting evidence. Lords Hatherley, Coleridge, and Blackburn dissented, on the ground that, in the most favourable view of the evidence, there was not enough uncontradicted to entitle the plaintiff to a verdict, and, in such a case, it was for the court to decide, and direct a verdict for defendant or a nonsuit.—*The Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*, 3 App. Cas. 1155.

2. The owners of the ship G. brought an action against the ship H., for damages from collision. The mate of the H. made an entry in the log, of the circumstances of the collision, at the time, and her master made a deposition, when he reached port, before the receiver of wrecks, as provided by the Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104, § 448). Both the mate and the master had since died. *Held*, that the log-book and the deposition were both inadmissible in evidence.—*The Henry Coxon*, 3 P. D. 156.

3. E., who was impecunious, consented to a decree as to a sum due from him to G. Subsequently a compromise was made through their respective solicitors, by which G. agreed to accept a less sum in settlement, on the ground that E. was poor, and that his father, who was believed to have property, had refused to assist him, or to have anything to do with him. Before this compromise was signed, E's father

died. E's solicitor knew of this at the time of the signing, but said nothing about it, and repeated the statement as to E's poverty and his unfriendly relations with his father. G's solicitor knew nothing of the father's death. G., thereupon, applied to have the original degree enforced, setting up the foregoing, and averring that as he "was informed and believed," the father had died intestate, in which case E. would be entitled to property more than enough to satisfy the decree. Malins, V. C., ordered the decree to be enforced. *Held*, that, in such a proceeding, evidence on information and belief should not have been admitted; but if the court below had admitted it, the defendant should not be allowed to object to it on appeal. The proper course was a separate action, to try the validity of the compromise, but the order of Malins, V. C., being right in substance, it was affirmed.—*Gilbert* v. *Endean*, 9 Ch. D. 259. See Domiciles; Felony; Negligence, 2.

Felony.

A clerk of a bank absconded, March 16, and on looking over his accounts, it was thought he was a defaulter to the extent of £100, or thereabouts. Subsequently, on March 24, he wrote the bank, confessing to have taken about £8,000. Orders for his arrest were given March 26, and, two days later, a warrant was issued, and committed to a detective, on the exertions of the bank. The detective found the culprit had left England. On March 19 and 22, the relatives of the clerk had interviews with the bankers, and one partner said, "My advice is, that he should get out of the country to America or elsewhere;" and again, on the suggestion of the wife, that the clerk return and throw himself on the mercy of the bank, the partner said, "No, if he did that, we should be obliged to prosecute him; if he were abroad, I don't suppose we should trouble further for him." After that, one of the relatives met the culprit in England, and since then he could not be found. On bankruptcy proceedings against the estate of the culprit, the bank was not allowed to prove its claim of £8,000, on the ground that it had compounded the felony. *Held*, by Bacon, C. J., that the claim could be proven.—*Ex parte Turquand. In re Shepherd*, 9 Ch. D. 704.

Feudal Tenure.

In Lower Canada, where the Crown took lands held in feudal tenure according to the law of France, all the feudal rights of the *seigneur* were extinguished, except a right of indemnity, amounting, until 1067, in the case of lands held by *roturires*, to one-fifth the value.—*Les Sœurs Dames Hospitalières de St. Joseph de L'Hôtel Dieu de Montreal* v. *Middlemiss*, 3 App. Cas. 1102.

Fixtures.

Testator gave his wife all his "household furniture," &c., "within my dwelling-house at the time of my decease." He lived in a leasehold house, containing tenant's fixtures, as gas-brackets, &c., put up by himself as tenant. *Held*, that these could not pass.—*Finney* v. *Grice*, 10 Ch. D. 13.

Frauds, Statute of,—See Mortgage, 4.

Fraudulent Conveyance.

K., the insolvent, assigned all his property to trustees, by a deed purporting to be by K. of the first part, the trustees of the second part, and the assenting creditors of the third part. The trustees were to carry on K.'s business, and pay all costs and charges and preferred claims, and make a dividend to all the creditors who gave notice. If a dividend, so assigned to a creditor, was not called for within a certain time, the trustees were to pay it over to K. Proof of debts, to the satisfaction of the trustees, was required. The assenting creditors were to indemnity the trustees for all loss or damage to which they should become liable. Subsequently, the defendants, who were not parties to the above arrangement, got a judgment against K., and levied on a writ of *fi. fa.* on property in the hands of the above trustees. The debtor had procured the above arrangement by assignment, fearing attachments by the defendants, among other creditors. *Held*, that the transaction was fraudulent and void, under 13 Eliz. c. 5., and the defendants' levy was good.—*Spencer* v. *Slater*, 4 Q. B. D. 13.

Fraudulent Preference.—See Company, 4.

Guaranty.—See Company, 4.

Husband and Wife.

By the Divorce Acts (20 and 21 Vict. c. 85, and 21 and 22 Vict. c. 108), a husband is liable for certain statutable costs of his wife, when suing for a divorce. *Held*, that a wife's solicitor might sue him also at common law for extra necessary costs, as for necessaries.—*Ottaway* v. *Hamilton*, 3 Q. B. D. 393.

See Pleading and Practice; Trust, 2.

Infancy.

By the Infants' Relief Act, 1874 (37 and 38 Vict. c. 62, §2), it is provided, that "no action shall be brought whereby to charge any person upon . . . any ratification, made after full age, of any promise or contract made during infancy. Defendant, on October 14, 1876, while an infant, formally offered to marry the plaintiff, and was accepted. March 8, 1877, he came of age, and the relations of the parties continued the same, as shown by affectionate letters between the two. No new promise was otherwise shown, and September 24, 1877, he broke the engagement. *Held*, that no action could be maintained.—*Coxhead* v. *Mullis*, 3 C. P. D. 439.

Injunction.

1. Where the court was of opinion that the defendant was attempting to represent to the public that he was carrying on the business of which the plaintiff was proprietor, *held*, that the fact, that plaintiff had known the facts for three years before beginning suit, was no bar to his right to an injunction. It is a matter governed by the Statute of Limitations only.—*Fullwood* v. *Fullwood*, 9 Ch. D. 176.

2. A railway company contracted to purchase a piece of land of plaintiff for its road, entered and built and opened their road over it, but did not pay the price nor the interest-money on the price. In an action for specific performance, and for an injunction against running trains over the land, and for a receiver, before decree, the application for the interlocutory injunction was *held* monstrous, and refused.—*Latimer* v. *Aylesbury & Buckingham Railway Co.*, 9 Ch. D. 385.

Insurance.

1. Action, by the assignee of a life-policy, against the insurance company. The company pleaded that they had paid the money due on the policy into court, under the Trustees Relief Act; that the policy said it was "liable to be paid and made good" out of the stock and funds of the company. *Held*, that the company was a mere debtor and not a trustee, and it must pay over the money to the claimant as matter of law. *Matthew* v. *Northern Assurance Company*, 9 Ch. D. 80.

2. The assured had information that the ship insured was in great danger of becoming a total loss, and the result was that the condition of the ship was such as to have entitled him to claim as for a constructive total loss, and the ship was afterwards properly sold as in case of constructive total loss. He failed, on receiving his information, to give prompt notice of abandonment, and of a claim for constructive total loss. *Held*, that he could not recover from the insurers. The doctrine of notice of abandonment, in such a case, is part of the contract of indemnity.—*Kaltenbach* v. *Mackenzie*, 3 C. P. D. 467.

See Mortgage, 5; Taxes.

Jurisdiction.

1. Patentee of certain shells obtained an injunction against the agents of the Mikado, a foreign sovereign, against putting some of these shells on board some war ships belonging to the Mikado, and lying in an English port. The shells were made in Germany, and bought and paid for there. The Mikado applied to be admitted a defendant, and, having been made one, he applied by his agent, to have the shells delivered up to him. Granted. The Mikado did not waive his rights as sovereige by becoming a defendant.—*Vavasseur* v. *Krupp*, 9 Ch. D. 351.

2. A court of bankruptcy ought to admit a creditor to the proceedings, if he is willing to come in, and encourage him to come in, though he is not amenable to the jurisdiction of the court. *Ex parte Fletcher*. *In re Hart*, 9 Ch. D. 381.

See Administration; Ecclesiastical Law, 1, 2.

LAW STUDENTS' DEPARTMENT.

We continue the publication of the Law Society Examination Papers, which was discontinued during the summer months. Some of our young friends write to us that they are "lonely without them." One says "I am sure if you published them monthly and students knew it, that your circulation would increase." We propose to give an opportunity of testing this observation. We are not too modest to think that many of those spoken of often spend five dollars for a much less useful purpose than subscribing to this journal.

Examination Papers. Trin. Term, 1879.

First Intermediate.

Williams on Real Property.

1. How comes it that a lessee for a term for even a thousand years is said to have a chattel interest only?

2. What do you understand by emblements?

3. What was the writ of waste? What is the procedure now in vogue?

4. What is the effect of a conveyance in fee by a tenant in tail to which the protector to the settlement has not given his assent—what estate is vested in the grantee?

5. What were the rules in connection with descents as to persons of the half-blood at common law and under the Statute of William?

6. What do you understand by the destruction of contingent remainders? What was the mode usually adopted to prevent their destruction? Explain the efficacy of the mode?

7. Sketch the form of "uses to bar dower" prior to the statute of 1834. Why is that form now of no avail?

Smith's Manual of Equity.

1. Explain the maxim, "Equity follows the law," in regard to executed and executory trusts.

2. Explain and illustrate the maxim, "He who comes into equity must come with clean hands."

3. In what cases of mutual mistake will relief be decreed?

4. When will misrepresentation be a sufficient ground for the avoidance of an agreement? Discuss the question fully.

5. Is an agreement between solicitor and client for payment of a gross sum in lieu of costs valid?

6. Are any precautions necessary on the purchase of personal property from executors?

7. What law (as between countries where the death, domicile, and distribution of assets take place) determines priorities of creditors and the fund out of which they shall be paid?

Smith's Common Law—Con. Stat. U. C. cap. 42 & 44, and Amending Acts.

1. Under what circumstances will it be lawful forcibly to eject a person from your house? Answer as fully as you can.

2. It is said that an account stated will not support a promise to pay at a future day. Explain this fully, giving reasons for the truth of this statement.

3. In how far is a husband chargeable with goods supplied to his wife by a tradesman?

4. Define the term "*dormant partner*" and "*nominal partner*." To what extent is each liable to third persons?

5. In how far is a master responsible for an injury happening to one of his servants in consequence of the negligence of another of his servants?

6. Must the expenses of noting and protesting a dishonoured promissory note be specially declared for in order that the same may be recovered? Give the reasons for your answer.

7. Can an action be successfully brought on a verbal representation made by A as to the character of B, to the intent that B should obtain credit from C thereupon? Give the reasons for your answer.

Certificate of Fitness.

Leith's Blackstone.—Real Property Statutes.

1. Give the definition of rent. State accurately its essentials.

2. Within what period should a will be registered? What is the effect of non-registration?

3. A remainderman and a reversioner die pending the prior estate. From whom will descent be traced under the various periods?

4. What is the meaning in the statute of Victoria as to descent of the words "where the estate shall come to the intestate on the part of the father or mother?"

5. What is the meaning of recent legislation as to tenancy by the curtesy?

6. Can an action be maintained upon a bond, the condition of which is to do an act contrary to law or *malum in se*, or to do something which becomes impossible to be done?

7. What is the effect of the Statute as to the right of a widow to dower out of improvements which may have been placed upon land at times subsequent to her marriage?

8. What are the provisions of the Statute as to the mode of pleading in cases of prescription?

9. When does the right to enjoy an easement over land become absolute when the land is vested in one person for life with remainder to another in fee?

10. What proceedings must be taken, and within what periods, in order that a mechanic may have a lien upon lands upon which he has expended labour or material?

Certificate of Fitness.

Smith on Contracts—The Statute Law.

1. Give a short summary of the statutory security given to mechanics, builders, and others for work done and materials provided upon buildings, beyond the ordinary Common Law remedies.

2. To what extent is an innkeeper liable to his guest for the safety of the goods of the guest brought to the inn? Answer fully, referring to any statutory enactment relating thereto.

3. What is an escrow? State accurately its essentials, referring to any decisions affecting the same mentioned by Mr. Smith.

4. *A contract by deed requires no consideration to support it.* Give exceptions to this rule, with reasons for the same.

5. What was the decision arrived at in the leading case of *Wain* v. *Warlters* in consequence of the use of the word *agreement*, in the fourth section of the Statute of Frauds? What subsequent legislation has taken place in relation to the law as laid down in that and kindred cases?

6. Distinguish between *executed* and *executory* considerations, and explain fully the expression that an *executed* consideration must have arisen from a previous request by the person promising, in order that it may be sufficient to support the *promise*.

7. A and B agree together that B is to furnish A with the money to pay premiums, and that A will with such money insure his life for the benefit of B. Will a policy issued under such an arrangement be binding? If so, why? If not, why not?

8. A loses $100 to B at cards and accepts a bill for the amount. B discounts the bill with C, who has no notice of the way in which it was obtained, for the full amount of the bill. What remedy has C against the acceptor, and why? Refer to any Statutes affecting your answer.

9. In what respects does the liability of a dormant partner differ from that of an ordinary one after dissolution of the partnership? Explain fully.

10. Give a short sketch of the remedy provided by way of *mandamus* by which the observance of contracts may be enforced.

Taylor's Equity Jurisprudence — Pleading and Practice.

1. Distinguish between satisfaction and performance.

2. Give the rules as to ademption of a legacy by a portion.

3. What is the foundation of the equitable jurisdiction as to relieving against forfeitures and penalties? By what test must it be ascertained whether relief can or cannot be granted?

4. What constitutes an infant a ward of the Court of Chancery? What are the incidents of wardship?

5. State the position and powers of a married woman as to her real estate under the various statutes of this Province.

6. Can a woman contract with her husband? Answer fully.

7. State some circumstances apart from fraud or mistake upon which the Court will set aside an award.

8. State shortly the usual course of an administration suit.

9. In filing a creditor's bill to set aside a fraudulent conveyance, when is it necessary to file it on behalf of all creditors of the debtor? Give the foundation of the necessity.

10. If a decree is not drawn up and settled in accordance with the judgment, in what manner can an application be made to correct it (1) before entry, (2) after entry? Give the whole procedure carefully.

Smith's Mercantile Law — Common Law Pleading and Practice—Statute Law.

1. Discuss and illustrate the meaning of the maxim. "*Jus accrescendi inter mercatores locum non habet.*"

2. A & B are partners in trade, under the name and style of A & B. A bill of exchange is drawn on the firm in its usual name of A & B, and is presented to A for acceptance, and he accepts it in his own name. State accurately the effect of such acceptance. What would be the effect of A *drawing* in his own name for the purpose of the firm?

3. An agent is bound to keep a clear account and communicate the result from time to time to his employer. In how far does this rule extend to the case of an inferior or sub-agent accounting to the principal instead of to his immediate master? Answer fully.

4. State shortly the extent to which failure to properly stamp a bill of exchange at the time it is drawn affects the validity of the bill.

5. Contrast the liability of several part owners of a ship for debts contracted for expenses and repairs with that of partners.

6. State accurately the rights of an indorsee of a bill of lading (*a*) at Common Law, (*b*) and now.

7. Define the terms *average, general average* and *demurrage.*

8. What precautions must be taken in case it is desired to take security on personal property for future advances to be made to a merchant for the purpose of carrying on his business? Give reasons for your answer.

9. What powers have been given to County Court Judges with regard to interlocutory proceedings and applications in Superior Court suits? Answer fully.

10. What provisions are made for the revision of bills of costs taxed by Deputy Clerks of the Crown and Pleas?

CORRESPONDENCE.

Division Court Jurisdiction—Set-off.

To the Editor of The Canada Law Journal, *Toronto.*

Dear Sir,—I take the liberty of asking your opinion on the following question, as it is one of considerable importance to persons having business in Division Courts, and it would be advisable to have the practice uniform, if possible:—"R.," living in No. 3 Division, is sued in his own county by "A." who lives in No. 2 Division. "R." pleads set-off, and at the trial tries to put in as his set-off a claim he has against "A." which claim arose in No. 2 Division.

The objection is taken that as the cause of action, if any, on this claim of "R." against "A." arose in No. 2 Division, "R." cannot in an action in No. 3 Division put it in as a set-off.

As I understand the law of set-off, it is a right given to avoid the necessity of cross-actions, and thus avoid litigation. But if the above objection be a valid one,

the right of set-off, so far as relates to Division Courts, is in many cases only a sham.

Yours, &c.,

Law Student.

[The right to set off is founded on 2 Geo. II. cap. 22, sec. 13, whereby mutual debts between plaintiff and defendant may be set against each other. The Statute 8 Geo. II. cap. 24, provides that mutual debts may be set against each other, although they be of a different nature and provides for the mode of doing so. The right of set-off is quite as extensive in Division Courts as in the Superior Courts (see the discussion in O'Brien's D. C. Manual, as to entry of judgment for defendant on set-off, 2nd ed. p. 318).

The provisions of sec. 62, &c., of the Division Courts Act, as to the division in which suits are to be entered, does not affect the right of a debtor to set off a debt under the statutes named, and there being no restrictions either in those statutes or in the Division Courts Act, we think that, when a Division Court is once resorted to by a plaintiff for the recovery of a debt, all the right of set-off which may be exercised by a defendant in any other Court may be set up by him in whatsoever Division Court he is summoned. Sec. 92 of the D. C. Act. (O'Brien, 2nd ed. 87.) seems to bear out this view.

The general principle, as we understand it, may be thus stated: The plaintiff, being *dominus litis*, can bring his action in any one of the Courts to which access is given by the Statute. But he is not to recover anything against a defendant contrary to the equities existing between the parties. It would be contrary to "equity and good conscience" that the plaintiff should recover if the defendant has a contra account which would reduce or annihilate it; and this, quite apart from any question as to the Court in which the set-off should be sued for.—Eds. L. J.]

Composition and Discharge.

To the Editor of The Law Journal.

Sir,—In the *Monetary Times* of July 4th, a case recently decided by the Judge of the County Court, at Halifax, is referred to, which case, it is said, amongst other things, touched on the right of an Assignee in Insolvency under the Act of 1875, to transfer the estate to the insolvent after the execution of a deed of composition and discharge, by the required proportion in number and value of the creditors, the Judge holding that the assignee had no right to transfer the estate to the insolvent, until the deed had been confirmed by *the Court*. This is said to be the first decision upon the point, for though referred to by Chief Justice Moss in *Re McFaren* v. *Chambers* in appeal, still, in that case, it was thought that the reference was to a confirmation by the creditors at the meeting held by them for the purpose of considering the deed.

If the view of the Judge at Halifax be correct, then it is clear that the wording of section 60 of the 1875 Act, is calculated to mislead, for it says "So soon as a deed of composition and discharge shall have been executed as aforesaid, it shall be the duty of the assignee to reconvey the estate to the insolvent."

And surely that seems to mean "executed" by the required proportion of the creditors; and if it means confirmed by the Court it should say so.

I think that the Legislature intended to leave it to the creditors themselves, each one having a right to be present at the creditors, meeting and explain his views, and this is reasonable, for otherwise the business of most insolvents would be gone, or materially injured by the delay, if kept out of his hands until all the time should have elapsed necessary to give all the notices, &c., attending the application to confirm a discharge by the Court.

I should like to see the question discussed in your Journal by others.

Yours, &c.,

Barrister.

[The point is one of practical importance, and worthy of discussion. We shall be glad to make room for any communication on the subject.—Ed. L. J.]

REVIEW.

The Law of Negligence: By Robert Campbell, M.A., of Lincoln's Inn, Barrister-at-Law, &c. 2nd edition. London: Stevens & Haynes, Law Publishers, Bell Yard 1878.

The first edition of Mr. Campbell's book was published in 1871, and was composed in the form of lectures for pupils. The present takes more the form of a practical essay on this important branch of the law. The subject is one of a varied and constantly changing nature, and as mercantile business, and manufactures, and science as applicable thereto, develop themselves, the law on the subject must necessarily rapidly increase in volume and importance. This edition is a decided improvement on the first, and will be found, in many ways, more useful to the practitioner, and none the less interesting to the student.

Mr. Campbell does not trouble the reader with preface or introduction, but gives, what is much more useful. a very full index.

FLOTSAM AND JETSAM.

Giants and their Tailors.—A singular case came before the judge of the Brighton County Court on the 3rd instant. The plaintiff was Mr, Ivens, a gentleman over six feet in height, and more than proportionately stout, whose gigantic proportions excited considerable interest as he stepped into the witness box. The defendants were a firm of tailors in Brighton, who had extensively advertised suits of Scotch tweed at two guineas. It appeared that Mr. Ivens requested the defendants to send some one to measure him for one of these suits; and, when the messenger arrived at his house, jocularly remarked that it would be a losing bargain. Responding in the same vein, the assistant said it would be a splendid advertisement for them, and that they made the little ones pay for the big ones. The plaintiff was then measured for the clothes, and went, as arranged, to try them on; but was met by the head of the firm, who, considerably less pleased than his assistant, said they were not accustomed to work for giants, and refused to make the suit. The plaintiff thereupon left the shop and obtained a suit elsewhere, and he now sued to obtain the difference in the prices, namely, thirteen shillings. The defence was that no contract had been made; but his Honour expressed a different opinion, and gave a verdict for the amount claimed, with costs.—*Law Journal.*

The political problems of our colonies are of the greatest interest and diversity, and it is probable that they will increase in complexity and importance. Unless the people of Victoria save themselves and us from what now appears to be imminent, Mr. Barry will precipitate questions demanding all our self-control to preserve us from the sphere of violence and passion. We have probably escaped a crisis in New Zealand; but those who have watched the recent progress of that colony believe that we have only postponed a collision of difficulties. In Canada there is less apprehension of trouble than elsewhere; but we have seen that intricate questions may arise in Canada demanding solution. In all these cases the Colonial Governors represent, or ought to represent, the best wisdom of England brought to assist in the solution of disputes, and helping forward such a solution both by freedom from temper and by fullness of knowledge. The Colonial Governor cannot, however, be better than the Colonial Office from which he derives authority and inspiration. According to Mr. Froude, the fountain of light is itself generally darkness, and although we cannot accept his lugubrious judgment on such a point as final, we must admit that cases too often arise in which Colonial Governors look to Downing Street for guidance and find none.—*The Times.*

We learn that in the administration of the estate of the late Chief Justice Harrison, there will be offered for sale the copyright of his two works, the "Municipal Manual" and the "Common Law Procedure Acts." Since the latest edition of the latter work was published, in 1870, the consolidation of the various Acts relating to Common Law Procedure has taken place; and this fact, independently of the time that has elapsed since the last edition, would make a new one now very acceptable. We hope some one of our readers may be found of sufficient enterprise to take up the work now that the opportunity is presented of acquiring the right to the labours of the late lamented Chief Justice.

Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 43rd VICTORIÆ.

During this Term, the following gentlemen were called to the Bar:—

Henry Theophilus Waring Ellis.
Peter L. Palmer.
George Tate Blackstock.
Alexander Jackson.
James Alexander Williamson.
George R. Webster.
Duncan Arthur McIntyre.
Thomas W. Crothers.
Charles W. Mortimer.
Frank Egerton Hodgins.
James Morrison Glenn.
Charles Wesley Colter.
George Claxton.
Hubert L. Ebbels.
Angus John McColl.

The names are given in the order in which they appear on the Roll, and not in the order of merit.

The following gentlemen were admitted as Students and Clerks.

Graduates.

John Young Cruickshank.
Thomas Arthur Elliott,
John Campbell Ferrie Brown.
Richard Scougall Cassels.
John Walter Delaney.
Frederick William Aplin G. Haultain.
Charles Coursolles McCaul.
John D. Cameron.
Thomas P. Corcoran.
John Carruthers.
James Chisholm.
Ghent Davis.
Joseph Alexander Culham.

Matriculants of Universities.

John Franklin Palmer.
James Duncan S. C. Robertson.
William Street Servos.

Graduate.

Henry James Campbell.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

Mathematics.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical analysis of a selected poem :—
1879.—Paradise Lost, Bb. I. and II.
1880.—Elegy in a Country Churchyard and The Traveller.
1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.
Translation from English into French Prose—
1878 and 1880 } Souvestre, Un philosophe sous les toits.
1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.
Musaeus, Stumme Liebe.
1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.
1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancin (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.

DIARY FOR DECEMBER.

2. Tues...County Court sittings for York begin.
4. Thur..Rehearing Term in Chancery begins. J. D. Armour sworn in Judge, Q.B., 1877.
5. Frid....Convocation meets.
6. Sat. .. Michaelmas Term ends.
7. Sun. ..2nd Sunday in Advent.
9. Tues..County Court sittings (ex. York) begin.
10. Thur..S. H. Blake sworn in as V. C., 1872.
14. Sun. ..3rd Sunday in Advent. Princess Alice died, 1878.
15. Mon. ..Morrison, J., sworn in Judge, Court of Appeal, 1877. Christmas Vacation in Supreme Court and Exchequer Court begins.
17. Wed...First Lower Canada Parliament met, 1792.
21. Sun. ..4th Sunday in Advent.
24. Wed...Christmas Vacation in Chancery and Court of Appeal begins.
25. Thur ..Christmas Day.
26. Frid. ..Upper Canada made a Province, 1791.
27. Sat. ..Spragge, V.C., appointed Chancellor, 1869.
28. Sun. ..1st Sunday after Christmas.
29. Mon....Nomination of candidates for municipal offices.
30. Tues...Convocation meets.
31. Wed...Revised Statutes of Ontario came into force, 1877.

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LAW SOCIETY OF UPPER CANADA. .....

Canada Law Journal.

Toronto, December, 1879.

The Right Hon Sir R. T. Kindersley died recently at the ripe age of eighty-seven. He was called to the bar in 1818. In 1848 he was made Master in Chancery, and three years later was appointed Vice-Chancellor. He retired in 1866, and was succeeded by Mr. Malins.

We are glad to know that Mr. J. A. Barron, Barrister-at-Law, has in the hands of the printer a work on the subject of Chattel Mortgages. Knowing the industry and intelligence of the author, we have no doubt he will produce a very useful and creditable volume. Chattel mortgages used to be "as thick as blackberries" in the good old days when creditors and sheriffs divided the spoil, and before the time came that official assignees got all and the creditors nothing; but though this sort of security is not quite so common now, there is ample room for a work on the subject.

An incident occurred during the trial of a cause in Chancery, at the recent sittings in Toronto, which was necessarily novel in this country, although probably common enough in the United States. The Attorney-General, Mr. Mowat, in speaking of a case in which he had given judgment, when occupying his former position as Vice-Chancellor, but which told against him in the case he was then arguing, said he should like to see it reversed on appeal, as the arguments that might be adduced against it induced him to think it was wrongly decided. The smile that rose on the face of the opposing counsel, the Treasurer of the Law Society, and others of the Bar, became audible as Mr. Vice-Chancellor Proud.

foot with a quizzical expression, solemnly remarked, "I fear I must pay more attention to the Judge than the Counsel."

THE LEGAL ARMY.

Some statistics from the records of the Law Society as to the increase in the ranks of our fraternity will not be uninteresting at the close of the year. It will be pleasant to many to know that there has been a very considerable falling off during the past twelve months in the numbers of those desiring to enter the profession. We much doubt if a rush of men into the profession argues a good state of things in the country at large. It certainly is not looked upon as an unmixed good amongst those whose names are enrolled at Osgoode Hall.

The records show that, in the year 1877, two hundred and nine young gentlemen presented themselves for examination, of whom one hundred and seventy-three passed. A larger number than usual —no less than 239—went up for examination in 1878, but the Examiners were equal to the occasion, and the slaughter was great, only one hundred and sixty-four coming back from "the jaws of death." In 1879, the number fell off considerably, one hundred and fifty-eight presenting themselves, of whom only one hundred and thirteen were successful.

In 1878, ninety-six articled clerks went up for examination, of whom seventy-two passed as attorneys, whilst in 1879 fifty-seven of the sixty-nine applicants stood the test. Of the seventy students who went before the Examiners for call, in 1878, only fifty-two were passed, whilst in 1879 nearly the same number went up for call as for attorneys (viz., sixty-seven), of whom fifty-two became barristers.

It is estimated that of those who pass the primary examination, only about one-half carry out their original intentions by becoming attorneys.

QUEEN'S COUNSEL.

Volumes have been written in the lay press during the past month, on the subject of the recent judgment in the Great Seal Case, or as it is otherwise styled, *Lenoir* v. *Ritchie*. We shall not at present discuss the judgment at any length, having only space for a *resumé* of the judgments delivered by the various Judges of the Supreme Court, and the judgment of Mr. Justice Gwynne, *in extenso*. We have obtained this judgment thinking that the views of the most recent Judge from Ontario, given in his usual careful and exhaustive manner, might best assist our readers, in this Province, (failing the judgments in full) in understanding the question. For the *resumé* we are indebted to the courtesy of Mr. Cassels, Registrar of the Supreme Court. So far the subject has been discussed in the public press solely from a party point of view. If the subject is not too stale when the politicians drop it for some more savoury bone we may take it up again.

We noticed that on the first day of the present Term, a prominent and much respected member of our Bar, who had been made a Queen's Counsel by the Lieutenant-Governor, under an Act of the Ontario Legislature, took his seat outside the Bar, and stated to the Court his reasons for so doing, namely, that as a doubt had been cast by such high authority on his right to wear silk he preferred to resume his old stuff gown. The Court without, expressing any opinion on the subject, thought that he had acted rightly; and courteously expressed the regret that there should be any

cause for his taking the course which a nice sense of propriety indicated. His brethren, whilst echoing the regret, will fully appreciate the action of Mr. Bethune. Others in the same position have not felt called upon to take this step, doubtless under the belief that the judgment of the Court does not decide the question. It is difficult to form an accurate opinion on the questions involved until after the case is reported.

It is supposed by some that the difficulty may be met by the Governor-General appointing those whose precedence and distinction has been questioned. Should Her Majesty's representative leave out of his list a few of those who have but scant claim to the honour, no great harm would result to the profession at large, nor be displeasing, we should suppose, to those who are unquestionably entitled to it.

THE PROFESSIONAL ARENA.

It was our unpleasant duty last month to animadvert upon the conduct of a member of the profession who had acted in a manner which we were compelled to characterise as illegal and unprofessional. We regret that an act of misconduct of another kind on the part of another barrister, residing in Toronto, has become so notorious that it would be affectation on our part to ignore it. In truth we should have been glad to have passed it over in silence, because, though fortunately uncommon, it was very discreditable. But that which the Chancellor of Ontario thought of so much importance as to have brought formally before the Court cannot well be overlooked; and it is now noticed, not so much in reference to the severe rebuke administered to the individual concerned, as a warning to others, who might be emboldened to follow a bad example were no notice taken of the occurrence.

It appears that two solicitors, a Mr. A. and a Mr. B. appeared before Mr. Thom, Taxing Officer of the Court of Chancery, in Toronto, on the taxation a bill of costs. A question having arisen as to some small item, Mr. A. declared that a statement made by Mr. B. was false, and that Mr. B. knew it to be false, &c. Mr. B. appealed for protection to the Taxing officer; but Mr. A continued to use similar expressions to, or in reference to Mr. B., in reference to various other items, which, but for the forbearance of the latter must have ended in a *fracas* there and then. We do not care to record the words used, but they were (as appears by the affidavit of Mr. Thom) of the most grossly insulting nature, and made in the presence of several other persons. The officer declined to continue the taxation, if such conduct was persisted in, and subsequently the parties left. Mr. B., however, after leaving the room asked Mr. A. to repeat what he had said in the office, which being done, Mr. B. with much promptitude administered a thrashing to Mr. A., much to the amusement of several witnesses waiting in the lobby to be heard before the Master. Mr. B. thereupon sent an apology to the Master, within the sanctity of whose domain the offence had been committed, for *his* share in the melee. The Master having obtained an affidavit of the facts from Mr. Thom laid the whole matter before the Chancellor, who subsequently directed counsel to bring it before the Court by way of motion to strike Mr. A. off the rolls.

When the motion came on for hearing, counsel appeared for Mr. A. and read an apology on his behalf. The Chancellor having asked if Mr. A. had also apologised to Mr. B., and being answered in

the affirmative spoke to the following effect:—

The Master was perfectly right in bringing to the notice of the Court the conduct of Mr. A. I am glad that in offering Mr. A's apology, his counsel has thought proper not to say anything in extenuation. The case is an extremly gross one, and I much regret that it should ever have occured. Although the apology now made is very full, I have much hesitation in accepting it. The accusations made by Mr. A. were such as no gentleman should ever make to another, and were couched in most offensive language. Gentlemen in the profession should not allow their tempers to get the better of them, nor forget that they are gentlemen, and they should act as such one towards another. I regret to say that I have on several occasions of late years noticed an unseemly bickering amongst practitioners when engaged in the conduct of suits, and especially in reference to the subject of costs. It is quite time that all this should cease. Courtesy from one solicitor to another is essential to the proper conduct of business and should never be forgotten. The present case shows to what a departure from this line of conduct may lead. I only remember one instance of a similar nature, in which an imputation of falsehood was made as in this case, and that happened many years ago. A solicitor who had been guilty of insulting and abusive language towards another solicitor in the conduct of business was so badly advised as to refuse for a time to make an apology, and he was suspended from practice until he did make an apology. I only mention this as indicating what procedure would probably be adopted by the Court in this case had an apology not been tendered. The language was grossly insulting, but as a full apology has been made, I feel bound to accept it. I trust, however, that Mr. A. feels the contrition which he expresses, and assuming that he does, the matter may be allowed to drop, on payment of the costs of the motion.

FRAUD ON THE INSOLVENT ACT.

The general rule that a man may do what he will with his own is qualified in the case of traders, by the consideration that he cannot make such an arrangement as that upon his insolvency any portion of his assets can be withdrawn from his creditors, and distributed or held otherwise than as provided by the Insolvent law. The cases on this branch of the law are collected and commented on in *Watson* v *Major*, 22 Gr. 198, and on appeal at p. 574.

There is another line of cases where the person, subsequently becoming insolvent, has executed an instrument in which it is provided that a right shall arise against him upon the commission of an act of insolvency, and where but for such insolvency the demand would not be in existence. Such securities are considered as being contrived for the purpose of evading the effect of the statute, and in effect operating as a fraud upon the Insolvent laws. The first case of the kind in this Province is *In re Hoskins*, 1 App. R. 379, where the insolvent had entered into a lease which contained a provision that, in the event of insolvency, the term should be forfeited and void, but the next *succeeding* current year's rent should be at once due and payable. The first year's rent was paid in advance, and during this first year the insolvency occurred. The second year's rent was claimed against the assignee; but the Court held that the claim was untenable, because the effect of it was to provide that for what turned out to be eleven months' possession, two years' rent should be paid, and therefore to give effect to the claim would be to divert from the body of the creditors so much of the assets as would be required to pay the second year's rent, for which

no value was received either by the insolvent or his creditors.

In *Ex parte Williams*, L. R. 7 Ch. D. 138, a mortgage executed by the insolvents contained an attornment clause by which the mortgagors became yearly tenants to the mortgagees at a rent seven times greater than the letting value of the premises. The mortgagors became bankrupt, and then the mortgagees claimed the right to distrain under the attornment clause. The Court enjoined the distress upon the ground, as it appears, that looking at the whole scope of the mortgage, and the intention of the parties, one could not help seeing that it was intended to make a different arrangement in the event of the mortgagors becoming bankrupt or not. The attornment clause was called by James, L. J., a contrivance to give the mortgagee an additional benefit in the case of the mortgagors' bankruptcy. It is observable in this case that this obnoxious clause had no reference in terms to the bankruptcy of the mortgagors, but the Court seem to have imported this term into it.

Some light is thrown upon this decision by the very recent case of *Re Stockton Iron Furnace Company*, 27 W. R. 433. The mortgage in that case also contained an attornment clause, but no sufficient evidence was given to make it apparent that the rent reserved was excessive as in the earlier case. Bacon, V. C., on the authority of *Ex parte Williams*, held the attornment clause bad and invalid, but the Court of Appeal reversed the finding. James, L. J., said: "If one could see that the rent was such an absurd sum that it really could never have been intended as a rent, but that it was only part of a device which would enable the mortgagee to obtain, in the event of the mortgagor's bankruptcy, something which he would not otherwise attain, the principle of *Ex parte Williams* would apply. And Bramwell, L. J., observed, "in *Ex parte Williams*, it was found that the intention and object of the arrangement was to commit a fraud on the bankruptcy laws; that the clause was to come into operation only in the event of bankruptcy. That was the substance of the agreement. There is nothing of the kind here."

It is evident that *Re Hoskins* goes very much further than these cases, because the attempt was in the English decisions to get a privilege over the other creditors by means of a distress. In *Re Hoskins* the attempt was merely to rank *pari passu* with the other creditors. Indeed Patterson, J., throws out his own views that, as between the parties, the bargain was binding and legal. He says at 1 App. R. p. 383: "As to the subsequent year's rent, I see no reason for refusing to hold that, as between the lessor and lessee, the amount became due and payable when the event happened, which the law declares shall produce the that result, viz.: the institution of the proceedings in insolvency." And again at p. 384, "It may be conceded that, as between the parties to the lease, it is an agreement in the nature of liquidated damages for the loss involved in the landlord's having to resume possession of the premises, and that, as I have already said, it creates a legal debt." But though there is some force in this reasoning it is difficult to see how effect can be given to these *dicta*. By the decision itself, it was held that the claim did not constitute a debt proveable in the insolvency proceedings; that being so, if it was yet valid between the parties, it would survive the insolvency and become a debt exigeable against the debtor when discharged from proveable claims. And in this way a debt, fraudulent in its inception as against the creditors, would

obtain ultimately a preference over them, and would be grouped in the same category with trust debts, and others to which the Act does not apply. The sounder conclusion, it is submitted, would be that such a claim, being founded on an illegal transaction, is, for all purposes, invalid. That, in brief, is the view of Thesiger, L. J., in *Ex parte Williams*, as he makes use of this language as to the attornment clause: "Then there was a separate stipulation *which might have taken effect in other event*, but which was palpably intended only to take effect in case of the mortgagor's bankruptcy." And it would seem to be the view of Mr. Justice Gwynne. Refer to his language in *Griffith* v *Brown*, 21 C. P. at p. 16.

An analogy also may be found in such cases as *Kerrison* v. *Cole*, 8 East, 231, where it was held that though a bill of sale for transferring the property in a ship by way of mortgage may be void, as such, for want of compliance with the requirements of the statute, 26 Geo. III., c. 60, yet it may be good as to the personal covenant contained therein, made by the mortgagor for the repayment of the money lent. Lord Ellenborough thought that to vacate the covenant for payment of the money lent would be going beyond the reason and object of the legislature in order to work injustice. And Le Blanc, J., said that as there was nothing immoral in the transaction itself there was no necessity for carrying the construction further. But in the case we are dealing with, no debt arises apart from the stipulation which is in contravention of the policy of the Insolvent Acts—there is no antecedent debt, and honesty does not require that remedies should be preserved as between the parties to the instrument which are not recognised in the administration of the assets by the assignee in insolvency.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS.

VACATION COURT.

Cameron, J.] [September 16.

CANADA AGRICULTURAL INSURANCE COMPANY v. WATT ET AL.

Principal and surety—Insurance agent—Bond for faithful discharge of duties.

Action on a bond given by defendants, W. and A., for the faithful performance of W's duties as plaintiffs' agent, and for the payment of all moneys, &c. received by him as such agent, alleging as a breach the nonpayment of certain moneys of the plaintiffs' received by him.

Plea: By defendant A, setting up, in substance, that when he executed the bond as such surety, W. was agent under an agreement with plaintiffs, whereby his remuneration was by fixed salary, and that afterwards, and before breach, the plaintiffs, without A's knowledge or consent, discharged W. from his then engagement, and re-engaged or re-appointed him on different terms, &c., namely, that his remuneration was to be by commission allowed for services performed, instead of by fixed salary as before.

Replication: In substance, that the remuneration of W, as such agent, whether by fixed salary or commission, formed no part of, and was not contemplated in the contract of suretyship, nor was the change in any way prejudicial to the interests of the surety, nor did it impose any greater liability upon him, and the said change did not include any change of the duties and obligations of said W as said agent.

Held, by CAMERON, J. replication bad, as being no answer to the plea which alleged a discharge of W. from his engagement and a re-engagement of him on different terms.

Semble, that the change in the mode of remuneration, namely by commission instead of by fixed salary would terminate the contract of suretyship.

A rejoinder alleged that A. was induced to enter into the said bond for said W. at a fixed salary, and believing such representation to be true he executed said bond, and the change in the plea set out was without his authority or consent

Semble, rejoinder good; that it was necessary to state that the said representation was made by plaintiffs, for under the rejoinder plaintiffs would have to prove that the representation was so made as to be binding on plaintiffs.

Bethune, Q.C., for plaintiff.

G. D. Dickson, for defendant.

Osler, J.] [October 3.

Ottawa Agricultural Insurance Co. v. Canada Guarantee Co.

Guarantee policy—Default in payment of moneys—Representation as to prior default —Meaning of—Pleading.

To an action on a guarantee policy for the due performance of one B's duties as secretary of plaintiffs' company, alleging a default in paying over certain moneys of plaintiffs, received by him, the defendant pleaded, setting up in substance a misrepresentation of plaintiffs, in stating that B had never been in arrear or in default in his accounts, yet that he had previously to the making of said representation been in arrear and in default, namely, while in the employment of one B.

Held, by Osler, J., plea good: that the proper construction of the contract alleged in the declaration was that the representation was not necessarily restricted to a default made while in plaintiff's service, but would include one made in any prior service, and that the extent of the representation might be proved at the trial.

J. K. Kerr, Q.C., for plaintiff.

H. J. Scott, for defendant.

CHANCERY.

Blake, V. C.] [Oct. 13.

Wilson v. Campbell.

Mortgage—Construction of—Interest.

This was a mortgage suit, and there being subsequent encumbrancers, a reference was directed to the Master. The proviso in the mortgage was as follows:—Provided this mortgage to be void on payment of the sum of $2,000 (in gold), of lawful money of Canada, together with interest thereon, at the rate of 8 per cent. per annum, as follows:—The said principal sum of $2,000 at the expiration of five years, from the date hereof, viz., April 16th, 1877, and the interest thereon at the rate aforesaid; in the mean time, half-yearly, on the 16th days of the months of October and April, in each and every year of the said term of five years; the first payment of interest to be made on the 16th day of October next, 1872, and also upon payment of interest, and after the rate aforesaid, upon all such interest money as shall be permitted or suffered to be in arrears, and unpaid after any of those days and times hereinbefore limited and appointed for payment thereof.

A subsequent encumbrancer appealed from the report made by the Master.

1. Because the Master in taking the plaintiffs' account, allowed them compound interest upon interest in arrear with rests, instead of allowing simple interest upon the interest in arrear.

2. Because the Master allowed the plaintiffs interest upon interest, subsequent to the time when the principal money secured by their mortgage fell due.

Appeal allowed on both grounds.

T. Langton, for the appellant.

J. C. Hamilton, contra.

Proudfoot, V.C.] [Nov. 11.

Maclennan v. M'Lean.

Mortgage—Mortgagee and mortgagor—Discharge of mortgage.

A mortgagor or other party entitled to the equity of redemption has a right to obtain at his own expense from the mortgagee a release of the mortgage, including a covenant against incumbrances. He is not obliged to accept the simple discharge of mortgage prescribed by the statute.

The purchaser of a mortgaged estate paid the amount due on the mortgage to the mortgagee, who executed a statutory discharge of the incumbrance, which recited that the money due upon the mortgage had

been paid by the mortgagor, and refused either to sign a discharge stating correctly the name of the plaintiff as the person paying, or to execute a release of the mortgage in his favour, the plaintiff offering to furnish satisfactory proof if desired, that he was the owner of the equty of redemption. The Court, on a bill filed for that purpose, ordered the mortgagee to execute the release and pay the costs of the suit.

Proudfoot, V. C.] [November 11.

Cannon v. Toronto Corn Exchange.

Incorporated society—By-law—Expulsion of member—Arbitration of questions arising between members.

The Toronto Corn Exchange was empowered to pass by-laws for the proper governance of the body. One of the by-laws enabled the society to expel any of its members for flagrant breaches of the rules of the body, and a refusal to submit a question arising between members to arbitration was declared to be a flagrant breach thereof. One member claimed against another (the plaintiff) a balance of $1.06, a sum of $397 for freight on grain purchased from him, and which, it appeared, the purchaser had been compelled to pay, and did pay under protest, before obtaining the grain, and which amount the purchaser insisted the plaintiff was bound to pay, and also a sum for costs incurred in an action brought by the purchaser to recover back the freight so paid from the carriers. The two first items the plaintiff admitted and offered to arrange, but disputed the last and refused to arbitrate as to any other item of the account than the last, whereupon the council of the defendants passed a vote of expulsion against the plaintiff, and did expel him from the benefits of the Association. On a bill filed to set aside such order of expulsion and reinstate the plaintiff in his rights of membership, the Court granted the relief prayed with costs; and,

Quære, whether either of the items was such a claim as the statute contemplated being the subject of a reference between members of the Association.

The by-laws of an association provided that notice of a meeting for the expulsion of a member must be given. *Held*, that a notice of "a meeting to take into consideration the conduct of a member" was not a compliance with such provision, and that such notice should state what the object of the meeting was.

Chancellor.] [November 12.

Clemmow v. Booth.

Purchaser of part of mortgage estate—Party seeking equity must do equity—Costs.

The rule that "he who comes for equity must do equity" applied where a purchaser of a portion of an estate subject to mortgage gave a covenant to pay a proportion of the mortgage money. On a bill being filed by the vendor's assignee to compel payment by the purchaser, the Court refused to give such relief except upon the terms of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant on the part of the vendor that he would pay. But the Court refused to include a direction that the payment by the purchaser of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due.

In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceeding against such defaulting purchasers upon indemnifying him against costs.

The plaintiff by his bill did not submit to do what he was bound to do as the price of the relief asked; and the defendant asked relief which the Court could not grant. On pronouncing a decree, costs were refused to either party.

Chancellor.] [November 12.

Jack v. Greig.

Fraudulent conveyance—Father and son—Money lent by son.

A son left his father's house at the age of sixteen, with the assent of the father, a farmer, and went to teach school at a dis-

tance from his father's residence, it being agreed between them that he should remit to his father from time to time so much of his earnings as he did not require for his support, and that the same should be repaid by the father after the son should attain majority, as the son should want it from time to time for his support and education at a College or High School. Accordingly remittances were alleged to have been made to his father, which on the son coming of age amounted to $600 and upwards when he found his father was unable to repay his advances. It was then arranged that the son should make further advances, and that unless the father repaid them the son was to have the farm conveyed to him, subject to certain incumbrances upon it. Advances were subsequently made by the son, and on a settlement in 1877 it was ascertained that the father's indebtedness amounted to $1,600, which it was then agreed should be the consideration for the purchase of the equity of redemption of the father in the premises, the conveyance of which was impeached by a judgment creditor of the father under the 13th Elizabeth. The Court being satisfied of the *bona fides* of the dealings between the father and son, and that the sums claimed had really been advanced by the son (although the only evidence of the dealings was that of the father and son), dismissed the bill; but the case being of such a peculiar character, the dealings so loose, and the evidence of actual advances so much less satisfactory than it might have been, as to invite investigation, without costs.

Chancellor.] [November 12.

HOWEY v. HOWEY.

Alimony—Desertion—Exclusion.

In consequence of a wife having disobeyed her husband by visiting at the house of his brother-in-law, the husband put her bed and bedding and chest outside the dwelling-house and locked the door of the house against her. *Held*, that this was such an act of exclusion and expulsion by the husband as entitled the wife to a decree for alimony.

COMMON LAW CHAMBERS.

HAY v. DRAKE.

Osler, J.] [Oct. 14.

Sheriff's fees—Taxation—Revision.

Where a Sheriff's fees have been taxed before a Deputy Clerk of the Crown, under R. S. O., ch. 66, sec. 48, a revision of such taxation cannot take place before the principal Clerk of the Crown, but the Court may refer the bill back to the same Deputy Clerk for a revision of the taxation, where it clearly appears that items have been improperly allowed.

MERCHANTS' BANK v. PIERSON.

Osler, J.] [Oct. 14.

Examination—Non-production of books—Attachment.

A manager of a bank having been ordered to attend for examination, in a cause in which the bank was the plaintiff, he was notified by a notice endorsed on the order to produce the books of the bank at such examination. This he neglected to do.

Held, that proceedings against him for attachment must be made before the Court, and not before a Judge in Chambers.

WILSON v. ÆTNA LIFE ASSURANCE CO.

Mr. Dalton, Q.C.] [Oct. 22.

Foreign corporation—Service—Agent.

The defendants were a foreign Insurance Company, doing business in Ontario, and having a head office for this Province at Toronto. The writ of summons was served on the local agent of the defendants' company at Ottawa.

Held, that the service was good.

DENMARK v. MCCONAGHY.

Osler, J.] [Oct. 28.

Examination—Fees—Stamps—Deputy Clerk of Crown.

Where an examination of parties pursuant to R. S. O., ch. 50, sec. 161, takes place before a Deputy Clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money.

Brown v. Corporation of York.

Mr. Dalton, Q.C.] [Oct. 31.

Pleading—Jurisdiction—Plea in bar.

The plaintiff brought his action against the Corporation of the County of York, for non-repair of a highway at Islington, not stating in what county that place was situated, and laid his venue in Peel. The defendant pleaded that the Court ought not to have further cognizance of the action, because the cause of action was local and arose in York and not in Peel. He also pleaded pleas in bar.

Held, that this being a plea to the jurisdiction it could not be pleaded along with pleas in bar.

Thorburn v. Brown.

Mr. Dalton, Q.C.] [Oct. 31.

Examination of parties—Order to re-examine.

A party, who has before judgment examined another party to the cause adverse in interest, is not entitled to a re-examination of the same party, except under the most special circumstances.

Hyde v. Casmea.

Mr. Dalton, Q.C.] [Oct. 31.

Similiter—Jury notice—Joinder.

The plaintiff joined issue upon the defendant's pleas and at the same time filed a similiter, without a jury notice. The defendant afterwards filed a second similiter, and with it a jury notice.

Held, that the first similiter was good, that the second was unnecessary, and must, together with the jury notice, be struck out.

CHANCERY CHAMBERS.

Biggar v. Way.

Blake, V. C.] [Oct. 27.

Abatement—Time—Practice.

In this case the Master's report made in March, 1879, fixed the 17th September following, for Austin and Hilton, the subsequent encumbrancers, to redeem. The sole plaintiff died on 24th of May, 1879, an order of Revivor was obtained on 24th June, 1879, and served on the 1st September, 1879.

An order of the Referee appointed a new day for payment, allowing Austin and Hilton an additional length of time to redeem, equal to the time the suit remained abated, viz., from 24th May to 14 days after the service of order of revivor.

Miller, for the representatives of the plaintiff appealed from the Refree's order.

Spencer, contra.

Blake, V.C., considered that the practice of allowing such time on abatement well settled and dismissed appeal with costs.

Imperial Loan Company v. O'Sullivan.

Spragge, C.] [June

Subsequent encumbrancers—Priority.

Where there were two encumbrances registered against property, the first encumbrancer pressing the mortgagor for payment, and selling out the chattels in a hotel on the property, and where at the request and instance of the mortgagor, and to stop such sale, A advanced $1,000 to the first mortgagee, and took a mortgage to secure himself from the mortgagor, but with no understanding with the first encumbrancers.

Held, that A, though he reduced the first mortgage by $1,000, and so bettered the position of the second mortgage by that amount, could not in the absence of express stipulation with the first mortgagee obtain priority over the second mortgage.

O'Sullivan, for defendant (appellant).

Worrell, for defendant Crombie (respondent.

CANADA REPORTS.

SUPREME COURT OF CANADA.

ELECTION CASES.

The Montmorency Case.

Valin v. Langlois.

Con. Elec. Act, 1874, *held constitutional—Power of Dominion Legislature to confer on Courts, authority to deal with election cases—Con. Elec. Act*, 1874, *established a Dominion Election Court, when it utilised Provincial Courts and Judges.*

[Ottawa, Oct. 28, 1879.

Appeal from the judgment of the Hon. Mr. Chief Justice Meredith of the Superior

Court for Lower Canada, rendered in the above cases, on the 15th January, 1879.

The petitioner Langlois filed on the 4th November, 1878, in the Superior Court for Lower Canada a petition under the Controverted Elections Act, 1874, complaining of the undue election and return of the respondent Valin as member for the House of Commons for the County of Montmorency.

The respondent Valin filed certain preliminary objections. One called in question the jurisdiction of the Court. This objection was raised in the following terms:—

"That this Court is incompetent to decide the pretended election petition presented in this cause :

Because, according to the B. N. A. Act, 1867, the jurisdiction of Courts of Justice is given by Provincial Legislatures ;

Because the Legislature of the Province of Quebec has never given to the Superior Court, nor to any Judge of that Court, the power to decide petitions relating to the election of members of the House of Commons of Canada.

Because the Controverted Elections Act, 1874, is *ultra vires* and unconstitutional in so far as it gives to the Superior Court of the Province of Quebec the power to decide petitions relating to the election of members of the House of Commons of Canada."

The Chief Justice of the Superior Court by his judgment dismissed the objections, and maintained the jurisdiction of the Court. His judgment is reported at length in the Quebec Law Reports, vol 5, page 1.

The objection in the case before the Court, although by its terms confined to the Superior Court for Lower Canada, brought forward for discussion and adjudication the more general question as to the right of the Dominion Legislature to impose on the Courts of the various Provinces and the Judges of such Courts the duty of trying controverted elections of members of the House of Commons. This question has given rise to considerable diversity of judicial opinion, as appears by reference to the following cases :—

See *Ryan* v. *Devlin* (Montreal Centre case), 20 L. C. Jur. 77 ; *Owens* v. *Cushing*, (Argenteuil case), 20 L. C. Jur. 86 ; *Bruneau* v. *Massie*, 23 L. C. Jur. 60 ; *Belanger* v. *Caron* (County of Quebec case), Q. L. R. 19 ; *Dubuc* v. *Vallee* Q. L. R. 34 ; *Guay* v. *Blanchet*, (Levis case), Q. L. R. 43 ; *Plumb* v. *Hughes* (Niagara case), 29 U. C. C. P. 261 ; *Deslauriers* v. *Larue* (Bellechasse case), not yet reported.

H. C. Pelletier Q.C., for appellant.

Langlois, Q.C., for respondent.

Held, on appeal :

1. The property and civil rights referred to in sub-sec. 13 of sec. 92 of the Act were the property and the ordinary civil rights over which the power to legislate had been reserved to the Local Legislatures, and neither this, nor the right to organize Provincial Courts by the Provincial Legislatures, was intended in any way to interfere with, or give to such Provincial Legislatures any right to restrict or limit the powers in other parts of the Statute conferred on the Dominion Parliament ; and that the right to direct the procedure in civil matters in those Courts (sub-sec. 14 of sec. 92) had reference to the procedure in matters over which the Provincial Legislature had power to give those Courts jurisdiction, and did not in any way interfere with, or restrict, the right and power of the Dominion Parliament to direct the mode of procedure to be adopted in cases over which it has jurisdiction, and where it was exclusively authorized and empowered to deal with the subject matter ; or take from the existing Courts the duty of administering the laws of the land.

2. Whether the Controverted Election Act of 1874 established a Dominion Election Court or not, the Parliament of the Dominion, in legislating on this matter, on which they alone in the Dominion could legislate, had a perfect right to confer on the Provincial Courts power and authority to deal with the subject matter as Parliament should enact ; that this legislation, being within the legislative power conferred on them by the Imperial Parliament, their enactments in reference thereto become the law of the land which the Queen's Courts are bound to administer.

3. The Supreme and Superior Courts of the Provinces are bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures. They are no mere local courts for the administration of the local laws passed by the local Legislatures of the Provinces in which they are organized. They are the Courts which were the Courts of the respective Provinces established before Confederation, and were continued "as if the union had not been made" by the 129th sec. of the B.N.A. Act, and subject, as therein expressly provided, "to be repealed, abolished or altered by the Parliament of Canada, or by the Legislatures of the respective Provinces, according to the authority of the Parliament, or of that Legislature under this Act."

4. Section 101 of the B. N. A. Act providing for "the establishment of any additional Courts for the better administration of the laws of Canada, gives a power which is to be exercised only as occasion should require, and in the event of the

existing tribunals becoming incapable of executing the Federal laws.

5. *Per* Ritchie, C.J., and Taschereau and Gwynne, J J., the Controverted Elections Act, 1874, established, as the Act of 1873 did, a Dominion Court, though it utilized for that purpose the Provincial Courts and Judges.

SAME CASE.

Con. Elec. Act, 1874, *sec.* 8 *ss*, 2—*Service of petition—Delay—Counter petition.*

The appellant, Valin, also appealed from the decision of Meredith, C. J., dismissing a counter petition, filed by Valin against Langlois, alleging that Langlois was a candidate at the same election and was guilty, as well by himself, as by his agents, with his knowledge and consent, of corrupt practices at the said election. The petition was dismissed because it had not been served until after the expiry of the 30 days mentioned at the beginning of sub-section 2 of section 8 of the Controverted Elections Act, 1874, and because the extra delay of 15 days mentioned towards the end of the said sub-section, within which extra delay the petition had been served, is exceptional and confined to a petition alleging corrupt practices *after the return.*

H. C. Pelletier, Q. C., for appellant.

Langlois, Q. C., the respondent in person.

Held: 1. *Per* Ritchie, C. J., and Strong, J., that a counter petition is only to be presented in the case where the unsuccessful candidate is not a petitioner, and that on this ground, without expressing any opinion on the other parts of sub-section 2 of section 8, the appeal should be dismissed.

2. *Per* Fournier, Taschereau and Gwynne, J. J., that the appeal should be dismissed for the reasons given by Meredith, C. J.

Henry, J., dissented and held that the appeal should be allowed with costs.

Appeal dismissed with costs.

NORTH ONTARIO CASE.

WHEELER v. GIBBS.

Notice of setting down appeal—Supreme Court Act, sec. 28—*Rules* 56, 69.

[Ottawa, Oct. 28th, 1879.

Motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the setting down of the appeal for hearing by the Registrar of the Supreme Court of Canada, given notice in writing of such setting down, nor applied to and obtained from the judge who tried the petition further time for giving such notice, as required by section 48 of the Supreme and Exchequer Court Act.

The record was transmitted to the Registrar of the Supreme Court on the 11th June, 1879. On the 24th September, 1879, application was made on behalf of the appellant to the Chief Justice, under Rule 55 (Supreme Court Rules), to dispense with printing part of the record. It appearing, when this application was made, that the fee for entering the appeal had not been paid to the Registrar (see Rule 56 and schedule therein referred to), the Chief Justice refused to entertain the application until such fee should be paid and the appeal duly entered. Thereupon the agent for appellant's solicitors paid the fee and the Registrar set the appeal down for hearing on the then next session of the Court, and the Chief Justice made the order as asked. On the 20th October following the agent for the appellant's solicitor made another application to further limit the printing, which was granted upon payment of $5 costs to the respondent. The agent for the respondent's solicitor appeared on both these applications.

No notice of the setting down of the motion of the petition for hearing was served until the 28th October, nor had any application been made to the Judge who tried the petition for further time to give notice.

Cockburn, Q. C., for respondent. The notice is a condition precedent, that the Supreme Court had no jurisdiction to hear the appeal in the absence of such notice, nor any power to relieve against failure to give it. He cited Maxwell on Statutes, p. 334, and cases there referred to.

McTavish contra. The appearance by the agent of the respondents' solicitors on the application, more especially the attendance on the later application and the acceptance of the costs, is a waiver of the provision as to notice; and in any event, the objection is a formal one to which Rule 69 applies.

Held, That the provision of the statute requiring notice to be given within the three days after the setting down of the appeal, or within such further time as the Judge who tried the petition might allow, was imperative and not directory, and the giving such notice was a condition precedent to to the right of the Supreme Court to entertain the appeal; that the objection went to the jurisdiction of the Court, and was not one merely of form which could be dealt with under Rule 69, or deemed to have been waived; and that, therefore, the appeal could not be heard, but must be struck out of the list of appeals with costs of the motion.

Peter Lenoir et al. *Appellants.*

AND

Joseph Norman Ritchie, *Respondent.*

Supreme Court—Jurisdiction—Powers of Local Legislatures—Power of Appointment of Queen's Counsel vested in Governor-General as representing Her Majesty.

[Ottawa, Oct. 31.

This was an appeal from the Supreme Court of Nova Scotia, in the matter of the application of Joseph Norman Ritchie, for the recognition of his rank and precedence as Queen's Counsel.

Joseph Norman Ritchie, a barrister of the Supreme Court of Nova Scotia, was appointed one of Her Majesty's Queen's Counsel for Nova Scotia on the 26th December, 1872, by Letters Patent under the Great Seal of Canada. On the 7th of May, 1874, the Legislature of Nova Scotia passed an Act (37 Vict., c. 20) authorizing the Lieutenant-Governor of Nova Scotia to appoint Queen's Counsel for that Province. On the same day the Legislature of Nova Scotia passed an Act (37 Vict., cap. 21) to regulate the precedence of the bar in Nova Scotia. No Queen's Counsel were appointed for Nova Scotia by the Lieutenant-Governor, between the 1st day of July, 1867, and the passage of the last mentioned Act, nor until the 27th May, 1876. On the 27th May, 1876, Letters Patent were issued by the Lieutenant-Governor of Nova Scotia, appointing appellants, together with other barristers, Queen's Counsel, which Letters Patent, also professed to regulate their precedence in the order therein mentioned, naming the appellants (Mr. Lenoir and Mr. Haliburton) and others before the respondent. Subsequent to the 27th of May, 1876, the prothonotary of the Supreme Court of Nova Scotia at Halifax, in making up the dockets, &c., gave the appellants with others, precedence over the respondent which had not been accorded to them since the date of the respondent's appointment in 1872. Thereupon, on the 3rd of January, 1877, the respondent applied to the Supreme Court of Nova Scotia, and obtained a rule *nisi*, to confirm the precedence given him by his Letters Patent, and to direct that he should have precedence in that Court over all Queen's Counsel appointed for the Province of Nova Scotia since the date of his patent. Among other grounds, the appellants urged in support of the rule, that the 20th and 21st chapters of the Provincial statutes of 1874, were *ultra vires*, and the appointments under them invalid; that as regards chapter 21, it could have no retrospective effect, and that the letters patent themselves were not sealed with the proper Great Seal of the Province of Nova Scotia, and were, therefore, void. The Supreme Court of Nova Scotia, by a majority of judges, made the rule absolute on the second of the above grounds, maintaining the validity of the acts mentioned. But although it was not, therefore, material to the issue, in the opinion of the Court, to consider the question of the validity of the seal used, the members of the Court thought that question of so much importance, that in their judgments, they dwelt at considerable length upon it, and the majority of the judges held that the seal affixed to the patent was not the true Great Seal of Nova Scotia. The Judges of the Supreme Court of Canada have held that it was not necessary for them to consider this question, and therefore no further reference need to be made to it.

A preliminary question was raised on behalf of the respondent, to the effect that the Supreme Court of Canada had no jurisdiction, inasmuch as the judgment complained of was not one from which an appeal would lie, under the provisions of the Supreme and Exchequer Court Act.

Haliburton, Q.C., for appellants.
Cockburn, Q.C., for respondent.

Held 1. That the judgment of the Court below was one from which an appeal would lie to the Supreme Court of Canada; Fournier, J., dissenting, on the ground that the judgment was one rendered by the Supreme Court of Nova Scotia, in the exercise of the discretionary power which all Courts of original jurisdiction have of regulating their affairs, and that it would be impossible, in the event of the Supreme Court of Canada reversing the decision of the Court below, for the former Court to enforce its order, which would therefore remain a dead letter.

2. *Per* Strong Fournier, and Taschereau, JJ.—That the Acts of the Legislature of Nova Scotia were not restrospective, and must be so construed as not to disturb or take away precedence given by the patent issued to the respondent; and that the Letters Patent issued under the authority of those Acts were void in so far as they attempted to interfere with the privileges of the respondent.

3. *Per* Henry, Taschereau and Gwynne, J.J.—That the acts of the Legislature of Nova Scotia in question are *ultra vires* and void, if their intention be to invest the Lieutenant-Governor with the authority of appointing to the rank or dignity of Queen's Counsel, which Her Majesty herself, or through her representative His Excellency the Governor-General alone, has the right to confer.

4 .*Per* Henry and Gwynne, JJ.—That the said acts do profess to invest the Lieu-

tenant-Governor with such authority, and are therefore *ultra vires* and void.

5. *Per* Taschereau, J.—That the Act of the Legislature of Nova Scotia, 37 Vict., c. 20, simply authorizes the Lieutenant-Governor to appoint provincial officers connected with the administration of justice to be known under the name of "Her Majesty's Counsel learned in the law," but that does not make them of the rank and dignity of that name granted by Her Majesty. It is a mere provincial office under that name, which the Provincial Legislature had the right to create, and the appellants are not Queen's Counsel at all in the sense attached to the name in the respondent's commission.

6. *Per* Henry, Taschereau and Gwynne JJ.—That the British North America Act, 1867, does not either expressly, or by inference, divest Her Majesty of this branch of her prerogative and confer it upon the Provincial Legislature or the Lieutenant-Governors of the Provinces. That Her Majesty forms no integral part of the Legislatures of the Provinces as she does of the Dominion Parliament, and is no party to the laws made by the Local Legislatures, and that no Act of any such Legislatures, can in any manner impair or affect Her Majesty's right to the exclusive exercise of all her prerogative powers.

7. *Per* Strong and Fournier, JJ.—That it is unnecessary to consider the question of the constitutionality of the Acts in question; that the presumption is so much in favour of the validity of the Acts that the Court ought not to deal with the question of their constitutionality, unless the subject matter under consideration imperatively requires it.

The Chief Justice, being related to one of the parties, took no part in the judgment.

The following is the judgment of

GWYNNE, J.—The respondent has raised three points of objection to the Appeal.

1st. He contends that the order of the Supreme Court of Nova Scotia, against which this appeal is brought, is not one from which an appeal lies within the meaning of the Statute constituting this Court; but that order is undoubtedly a final disposition of the matter relating to which it is made, and, if the contention of the appellants be well founded, materially impairs the legal rights of the appellants, and does therefore clearly, as it appears to me, constitute appealable matter.

2nd. He contends that the Letters Patent, by which the Appellants were purported to be made Queen's Counsel were not under the Great Seal of the Province, as they professed to be. It was admitted on the argument that we have been relieved by an Act of the Dominion Parliament, 40 Vic. ch. 4, from the necessity of determining this point, and of entering into the interesting heraldic research which it seemed to open; from this necessity, however, in the view which I take, we should have been relieved independently of that Act.

And 3rdly, which is the sole objection on the merits, he contends that the appointment of Queen's Counsel is *ultra vires* of the Provincial Executive, and that the Act of the Legislature of Nova Scotia 37 Vic. ch. 20 (in virtue of which the appointment of the appellants is by the Letters Patent under which they claim professed to be made) is *ultra vires* of the Provincial Legislature. This latter point the Supreme Court of Nova Scotia, while deciding in favour of the respondent upon another ground, pronounced to be quite untenable, but with great deference to the learned judges of that Court it seems to raise a very grave constitutional question. It was not disputed, as indeed it could not be, that the right to appoint Queen's Counsel is a branch of the Royal Prerogative; that it (equally with the power to grant Letters Patent of precedence, and to appoint Serjeants-at-law, Judges, Knights, Baronets, and other superior titles of dignity and honour) flows from the fountain of honour which has its seat and source in the person of Royalty. In England, in point of form, a Queen's Counsel is the standing counsel of the Queen, retained by her to be of her counsel in all matters in which she may require his services. Substantially, the title is one of honour and professional rank, conferring precedence upon the person invested with the honour. Though in point of fact the recipients of this honour are nominated and selected by the Chancellor for the time being, yet in point of form, the Queen's pleasure is taken upon their appointment. In the Colonies, the appointments were made, sometimes, I believe, under the Royal Sign Manual, but more usually by Letters Patent under the Great Seal of the particular Province of whose Bar the recipient is a member, signed by Her Majesty's representative within the Province, in virtue of the authority vested in him by his commission appointing him Her Majesty's representative, and in pursuance of Royal Instructions from time to time given to him, governing him in the execution of the powers vested in him in respect of matters in which the Royal Prerogative is concerned.

An Act of Parliament passed by the old Legislature of the respective Provinces, which now constitute the Confederate Provinces of the Dominion of Canada, under the constitution which they had before Confederation, of which Legislatures

Her Majesty was an integral part, as she is of the Imperial Parliament, upon being assented to by the crown, was competent to divest Her Majesty of the right to exercise within the Province any portion of her royal prerogative; but at the time of the dissolution of those old provincial constitutions upon the passing of the British North America Act, and of the creation of the new constitutions under which those Provinces were made members of the Confederation now existing, there had been no Act passed detaching the right to appoint Queen's Counsel from the Royal prerogative, or in any manner impairing or affecting Her Majesty's exclusive right to appoint them. The questions therefore which now arise are: Has the British North America Act invested the Lieutenant-Governors of the respective Provinces constituting the Confederation with the right and power to exercise this branch of the Royal prerogative, or has it invested the Legislatures of those Provinces with any control over it, for if Her Majesty is not, by that Act of Parliament, divested of this, her prerogative right, it must follow from the nature of the new constitutions which that Act confers upon the several Provinces, that no Act of any of the Provincial Legislatures thereby constituted can in any manner divest Her Majesty of this or any other branch of her prerogative, or impair or affect her exclusive right to the exercise of it. It is a well established rule that the crown cannot be divested of its prerogative, even by an Act of Parliament passed by Queen, Lords and Commons, unless by express words or necessary implication. The presumption is that Parliament does not intend to deprive the crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Now, when we consider the object of the British North America Act, the first thing that occurs to us is, that from anything appearing in it, there does not seem to be any reason or necessity for stripping the crown of its prerogative in respect of the particular matter in question, for the purpose of placing it under the control of the subordinate executive or legislative authorities of the respective provinces which the Act brings into existence. The particular right in question cannot consistently be vested in the crown, and also at the same time in either the executive or legislative authorities of the respective provinces; to be invested in either of the latter it must be absolutely separated from the prerogative, for if Her Majesty should still retain the power to appoint Queen's Counsel, or to grant Letters Patent of Precedence, she must retain it in virtue of that prerogative in virtue of which she originally held it. It would be quite anomalous and unwarranted by anything in the British Constitution of an analogous character, and it would be quite derogatory to the royal diguity that this power to confer rank and precedence which, by the constitution, Her Majesty possesses in right of her prerogative, should be shared by her with any subordinate person or authority.

If either authority should have power at pleasure to make appointments superseding those made by the other, the right to confer rank and precedence would in fact rest with neither.

In order, therefore, to vest the power in the subordinate Her Majesty must, *quoad* the power, be divested of her prerogative. Now, does the British North America Act in express terms, or by irresistible inference, divest Her Majesty of this branch of her prerogative?

By this Act, which is the sole constitutional charter of the Dominion of Canada and of the respective Provinces constituting the Confederation, Her Majesty expressly retains all her Imperial rights as the sole and supreme executive authority of the Dominion, and her position as an integral part of the Dominion Parliament. The Dominion of Canada is constituted a *quasi* Imperial power in which Her Majesty retains all her executive and legislative authority in all matters not placed under the exclusive control of the Provincial authorities, in the same manner as she does in the British Isles, while the Provincial governments are, as it were, carved out of, and subordinated to, the Dominion. The head of their Executive Government is not an officer appointed by Her Majesty, or holding any commission from her, or in any manner personally representing Her, but an officer of the Dominion Government appointed by the Governor-General, acting under the advice of a council which the Act constitutes the Privy Council of the Dominion. The Queen forms no part of the Provincial Legislatures as she does of the Dominion Parliament, the Provincial Legislatures consist in some Provinces of such subordinate executive officers and of a Legislative Assembly, and in others of such executive officers and of a Legislative Council and Assembly.

The use of Her Majesty's name by these Provincial authorities is by the Act confined to the summoning and calling together the legislatures, and singularly as it seems, this is, by the 82nd section, rather by accident I apprehend than design, confined to the Lieutenant-Governors of Ontario and Quebec.

By the 91st section it is declared that the Acts of the Dominion Parliament shall be

made by the Queen by and with the advice of the Senate and House of Commons, treating the Queen herself as an integral part of the Parliament, whilst the 92nd section enacts that the "Legislatures" of the respective Provinces, that is to say, the Lieutenant-Governor and the Legislative Assembly in Provinces having but one House, and the Lieutenant-Governor and the Legislative Council and Assembly in Provinces having two Houses, shall make laws in relation to matters coming within certain enumerated classes of subjects to which their jurisdiction is limited. Nothing can be plainer, as it seems to me, than that the several Provinces are subordinate to the Dominion Government, and that the Queen is no party to the laws made by those Local Legislatures, and that no Act of any such Legislatures can in any manner impair or affect Her Majesty's right to the exclusive exercise of all her prerogative powers, which she continues to enjoy untramelled, except in so far as we are obliged to hold that, by the express terms of the British North America Act, or by irresistible inference from what is there expressed, she has by that Act consented to being divested of any part of such prerogative.

It is contended that the 92nd section, subsection 14, involves such consent. That subsection places under the exclusive control of the Provincial Legislatures "the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in those courts;" but applying the well established rule as to the construction of statutes, namely, that the crown cannot be divested of its prerogative by statute, unless by express words or necessary implication, it appears to me to be very clear that nothing in this section can have the effect contended for; for Queen's Counsel have never been, nor can they be, regarded as a necessary element in the constitution and organization of courts either of civil or criminal jurisdiction. Those courts in fact were constituted and in perfect organization before ever the title or rank of Queen's Counsel was created, and they could still be conducted in full and perfect efficiency though that rank should never have been conferred. They are not in any sense officers of the courts, nor Provincial officers. In the whole course of Imperial and Provincial legislation, although Courts of Justice have been constituted by Act of Parliament, never has provision been made for the appointment of Queen's Counsel as part of the constitution and organization of such courts, nor has it ever been suggested, I venture to say, until now, that they form a part of such organization. The power to create this rank or order, having, by the constitution, existed always in virtue of the royal prerogative right to create titles of dignity and honour, the transfer of such branch of the prerogative from the crown to the Provincial Legislature could only be effected by language expressed in the most explicit terms. By the 96th section of the Act the power of appointing Judges, who do form a most essential element in the constitution of courts for the administration of justice, is transferred, not, however, to the Provincial, but to the Dominion Government. As to the appointment of Queen's Counsel nothing is said, nor is there any subject placed under the exclusive control of the Provincial Executive or Legislative authorities which, by the most forced construction, can, in my opinion, be said *necessarily* to involve the right to appoint Queen's Counsel. The result must therefore be that this right still continues to form, as it ever has formed, part of the royal prerogative vested in Her Majesty (who still retains her supreme executive authority over the Dominion of Canada equally as over the British Isles) to be exercised by her at her pleasure, either under her sign manual of through the high officer the Governor-General of the Dominion, who alone within these Confederated Provinces fills the position of Her Majesty's representative.

The Provincial Statute, in virtue of which the Letters Patent appointing the appellants are professed to be issued, recites that the Lieutenant-Governor *of right* ought to have the power of appointment. I fail to see, however, *by what right* that officer, who is not by the constitution Her Majesty's representative, *ought* to have the power to confer this title of honour in preference to Her Majesty herself, and to Her representative the Governor-General of the Dominion. I presume it will not be contended that greater discretion in conferring the rank upon the most worthy would be thus secured. The Imperial Parliament, however, is the only power which can vest the right in the Provincial Executive, and if it has not done so, no other power, not even the Provincial Legislature, is competent to say that of *right* the power *ought* to be vested in it. There are other considerations also, which appear to show the inconvenience of vesting such a right in the Provincial Authorities.

If vested in them it might with much force be asked what right could their Letters Patent confer, to entitle the recipient to recognition in this Court, or in any other Dominion Court, as for example the Maritime Courts, or an Insolvent Court, if such

should be established, while Her Majesty's appointment can confer the like rank in all those Courts, as well as in the Provincial Courts, and as well out of those Courts as within their precincts.

Then again, by an old law of the Province of Upper Canada, it was enacted that it should no longer be necessary that Commissions should be issued for holding Courts of Assize and *Nisi Prius*, Oyer and Terminer and General Gaol Delivery, but that if they should issue, they should contain the names of the Chief Justices and Judges of the Superior Courts of Common Law, and that they might also contain the names of any of the Judges of the County Courts, and of any of Her Majesty's Counsel learned in the law, of the Upper Canada Bar, one of whom shall preside in the absence of the Chief Justices, and of all the other Judges of the said Superior Courts, and that if no such Commissions should be issued, the said Courts should be presided over by one of the Chief Justices, or of the Judges of the said Superior Courts, or in their absence, then by some one Judge of a County Court, *or by some one of Her Majesty's Counsel, learned in the law of the Upper Canada Bar*, upon such Judge or Counsel being requested by any one of the said Chief Justices or Judges of such Superior Courts to attend for that purpose.

Now, if by any chance a gentleman claiming to hold the rank of a Queen's Counsel in virtue of Letters Patent, signed by a Lieutenant-Governor, should preside at a Court of Oyer and Terminer upon the trial of an important criminal case, and the validity of the trial should be called in question upon the ground that the gentleman presiding was not qualified to sit as a Judge, not having any commission from the Dominion Government, conferring upon him the rank of "Judge," and not having any appointment from Her Majesty conferring upon him the rank of "Queen's Counsel," a very embarrassing question might arise and the ends of justice might be frustrated. Convenience, therefore, as well as the observance of uniformity in the exercise of the power, would seem to concur with other considerations in pointing to the propriety of this branch of the Royal prerogative being maintained as of old inseparably annexed to that prerogative, and to be exercised at the sole discretion of Her Majesty, through Her sole representative in this Dominion, His Excellency the Governor-General.

The Provincial Act which contains the above recital, proceeds to declare and enact that it was and is lawful for the Lieutenant-Governor by Letters Patent under the Great Seal of the Province of Nova Scotia, to appoint from among the members of the Bar of Nova Scotia, such persons as he may deem right to be during pleasure Provincial officers, under the name of Her Majesty's Counsel learned in the law for the Province of Nova Scotia.

Now, if "it has been, and is lawful" for the Lieutenant-Governor to make Queen's Counsel, it can only be so by the provisions of the B. N. A. Act. If that Act does confer the power upon the Provincial Executive, no doubt the Lieutenant-Governor has it, and a Provincial Act can add no force to the Imperial Act. But if the Imperial Act does not confer the power then the Lieutenant-Governor has it not, nor can any Act of the Provincial Legislature effectually declare that he has, or by enactment pointing to the future confer it upon him.

The futility of a declaratory Act passed by a subordinate Legislature for the purpose of authoritatively defining the intention entertained by the Supreme Parliament in the Act which gives to the subordinate its existence, and professing to put a construction upon a doubtful point in that Act as to the powers conferred upon the subordinate is too apparent to need comment. The office of a declaratory Act is of a nature which requires that it should be passed only by the power which passed the Act, the intention of which is professed to be declared; and as to an Act providing for the future for the extension of the limits of the authority of the Lieutenant-Governor, it is equally plain that no power but the Imperial Parliament, which has set limits to the jurisdiction of the Provincial Executive, can extend these limits and enlarge that jurisdiction.

It has been said that the Crown officers in England at some time have given it as their opinion that the power claimed to be exercised by the Lieut.-Governor might be conferred upon him by an Act of the Provincial Legislature, of which he himself is a component part. I have not seen their opinion, nor have I been able to suggest to myself the arguments by which such an opinion could be supported; all I can say therefore, in the absence of the light of the opinion given, is, that, in the best exercise of my own judgment which I am bound to exercise here to the utmost of my ability, with such light as I have, I have been unable to bring my mind to any other conclusion than that the Letters Patent under which the appellants claim rank as Queen's Counsel, and the Provincial Statute in virtue of which these Letters Patent issued, as well as the Act regulating precedence are, for the reasons above given, null and void, and for this reason I am of opinion that the appeal should be dismissed with cost.

Appeal dismissed with costs.

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR NOVEMBER AND DECEMBER, 1878, AND JANUARY, 1879.

(Continued from p. 296.)

[This number includes the following of the Law Reports: 9 Ch. D. 1-734; 10 Ch. D.-48; 3 Q. B. D. 643-807; 4 Q. B. D. 1-18; 3 C. P. D. 393-537; 4 C. P. D. 1-24; 3 Ex. D. 313-383; 4 Ex. D. 1-31; 3 P. D. 73-198; 3 App. Cas. 933-1373.]

Laches.—See Mortgage, 3.

Lease.

July 15, 1861, B. made a contract with R. and F., to grant them an underlease of premises then leased and occupied by B., for the residue of the term, for which B. held the same, except the last ten days; the underlease to contain covenants and clauses similar to those in B.'s lease, and R. and F. to execute a counterpart of such underlease, without requiring any evidence of B's title. In pursuance thereof, B.'s solicitor prepared a lease for twenty-three years less ten days, with a covenant, *inter alia*, for quiet enjoyment of that time. R. and F. did not compare the underlease with B.'s lease. It turned out that the latter had only sixteen years to run. *Held*, that R. and F. had no remedy. They had been negligent in not inspecting the lease, and the rule of *caveat emptor* applied.—*Besley* v. *Besley*, 9 Ch. D. 103.

See Sale, 2.

Legacy.—See Set-off; Trust, 1.

Libel.—See Slander.

Limitations, Statute of.

A partnership between N. and C. terminated in 1861, when C. acknowledged a debt on balance due from him to N., of £787, and promised to pay it in a month, but had never paid it. Since then, N. had importuned him to enter into the partnership accounts and pay him; but C. had refused, and finally repudiated the debt and liability. N. brought suit, setting up these facts, and C. pleaded the Statute of Limitations by demurrer. *Held*, that the statute was a defence, and that it could be pleaded by way of demurrer. *Miller* v. *Miller*, L. R. 6 Eq. 499, criticised.—*Noyes* v. *Crawley*, 10 Ch. D. 31.

See Injunction, 1; Mortgage, 2.

Liquidation.—See Bankruptcy, 2.

Marriage.—See Domicile; Infancy.

Marriage Settlement.—See Settlement, 1.

Married Woman.

An application by a woman, aged fifty-four years and six months, who had been married three years and had no children, for payment to her of a fund of which she had the life-interest, remainder to her children, was refused. —*Croxton* v. *May*, 9 Ch. D. 388.

See Husband and Wife; Pleading and Practice; Settlement, 4; Trust, 2.

Master and Servant.

1. The defendants had a wharf on the Thames, where coal was brought in barges, to be used in their business of brewers. A gang of men unloaded the barges at 1s. 9d. a ton, paid by the defendants. One A., a servant of the defendants, hired the plaintiff to work in the gang. A was charged with getting the barges discharged, and either he or some other of the gang received the money in the lump from the defendants, and distributed it to the men who did the work. He hired the men; but they could not be dismissed without reference to the defendants. In the course of his work, the plaintiff was injured by a barrel negligently let fall upon him by another servant of defendants engaged in moving barrels at a point where plaintiff had often been, and knew what was going on. *Held*, that the defendants were not liable. The plaintiff was their servant, and not A.'s, and, though not engaged in the same work, he and the servant whose negligence caused the injury were fellow-servants. A. was a foreman, not a subcontractor. — *Charles* v. *Taylor*, 3 C. P. D. 492.

2. At L. there are two railway stations, that of the N. Railway, and that of the defendant, abutting on each other and having parallel lines of rails, with signals and points governing the entrance of trains, worked by signalmen whose duty is common to both stations. S., a signal-man, was hired and paid by the N. railway and wore its uniform. His duties were, however, common to the two railways, though he did not know the fact when he was appointed. In the discharge of his duty, S. signalled an engine of defendant coming towards the station on the N. company's arrival rails, with an N. company truck, to go on the defendant's departure-rails. The driver did so, and ran in, and then reversed and ran out on the other track, and negligently struck and killed S., without any negligence on the part of S. *Held*, that the defendant company was liable.—*Swainson* v. *The North Eastern Railway Co.*, 3 Ex. D. 341.

Misdescription.—See Will, 10.

Mortgage.

1. D., having no right or title in certain premises, mortgaged them to the plaintiff by producing forged deeds. The mortgage contained no recitals, but there were the usual covenants of mortgagor's title, and a covenant that he "had full power to grant and convey the said premises in manner aforesaid." Subsequently D. acquired the legal estate, and then mortgaged the property to the defendant, who had no knowledge of the previous mortgage. *Held*, that the implication, in the covenants of the mortgage to the plaintiff, as to the legal seisin of the mortgagor, D., did not amount to such an exact averment of title as to create an estoppel to deny it, against him